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CRIMINAL LAW

THE IMPACT OF *MIRANDA* REVISITED*

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I. INTRODUCTION

In 1966, the U.S. Supreme Court redefined the direction of modern confession law in *Miranda v. Arizona*,[1] one of the most well-known and influential legal decisions of the twentieth century. Seeking to dispel the compelling pressures it believed to be inherent in the "police dominated atmosphere"[2] of custodial questioning in *Miranda*, the Warren Court promulgated the now familiar fourfold warnings[3] to silence and appointed counsel that must precede every interrogation before it can legally commence.[4] Absent a voluntary, knowing, and intelligent waiver of the prophylactic *Miranda* warnings, any admission or confession will be excluded from evidence in subsequent trial proceedings.[5] While the *Miranda* opinion briefly noted both the history of the "third degree" in America[6] and the danger of false confessions,[7] it described the modern interrogation process as "psychologically

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1 Miranda v. Arizona, 384 U.S. 436 (1966).

2 *Id.* at 445.

3 "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have a right to talk to a lawyer before questioning and have a lawyer present during questioning. If you cannot afford to hire a lawyer, one will be provided for you." *See id.* at 467-73.

4 *Id.* at 467-74.

5 *Id.*

6 *Id.* at 445-48.

7 *Id.* at 447-48 (quoting NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 5 (1931)).

rather than physically oriented."[8] Nevertheless, relying on standard police training manuals, the *Miranda* opinion characterized custodial police questioning as manipulative, heavy-handed, and oppressive—all of which threatened to overcome the rational decision-making capacity of suspects who were ignorant of their constitutional rights.[9] The fourfold warnings, according to the Court, were thus a necessary procedural safeguard to protect a suspect's underlying Fifth Amendment privilege against self-incrimination.[10]

Along with only a few other Supreme Court decisions, *Miranda* has generated enormous popular, political, and academic controversy.[11] In its immediate aftermath, the *Miranda* opinion was assailed by police, prosecutors, politicians, and media. Police officials complained indignantly that *Miranda* would handcuff their investigative abilities.[12] Politicians linked *Miranda* to rising crime rates: Richard Nixon publicly denounced *Miranda* and other Warren Court decisions as representing a victory of the "crime forces" over the "peace forces" in American society, while individual congressmen called for Chief Justice Earl Warren's impeachment.[13] Congress as a whole responded to *Miranda* by attempting legislatively to invalidate its holding in the Omnibus Crime Control and Safe Streets Act of 1968.[14] Newspaper editorials deplored the Warren Court's "coddling of criminals," while cartoonists lampooned the logic of the *Miranda* decision.[15] Almost thirty years later, *Miranda* remains a symbol of controversy in American society and continues to be assailed by its many critics. The Supreme Court's confession decisions since 1966 have steadily chipped away at both the letter and the spirit of *Miranda*.[16] The U.S. Department of Justice's Office of Legal Policy under the Reagan Ad-

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8 *Id.* at 448.

9 *Id.* at 448-55.

10 *Id.* at 467.

11 As Gerald Caplan notes, "A 1976 poll of members of the American Bar Association to determine 'milestone events' in American legal history gave *Miranda* a fourth place ranking. No other criminal law decision finished higher." Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1418 n.7 (1985) (citing JETHRO K. LIEBERMAN, MILESTONES! vii (1976)).

12 *See, e.g.*, LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 176-77 (1983); FRED P. GRAHAM, THE SELF-INFLICTED WOUND 276-304 (1970).

13 BAKER, *supra* note 12, at 198-217, 245-46. *See also* Patrick Malone, *You Have the Right to Remain Silent: Miranda After Twenty Years*, 55 AM. SCHOLAR 367 (1986).

14 *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. II, § 701(a), 82 Stat. 197, 210 (codified as amended at 18 U.S.C. §§ 3501(a)-(b) (1994)); S. REP. NO. 1097, 90th Cong., 2d Sess. 37 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112.

15 BAKER, *supra* note 12, at 404; Malone, *supra* note 13, at 367; GRAHAM, *supra* note 12, at 185.

16 *See* Matthew Lippman, Miranda v. Arizona*: Twenty Years Later*, 9 CRIM. JUST. J. 241 (1987).

ministration characterized the decision as illegitimate in a 120 page report recommending that the Department of Justice urge the Supreme Court to overrule *Miranda* altogether.[17] Police interrogation manual writers,[18] legal academics,[19] and newspaper editorials[20] continue to call for its abolition.

What has been lost in all the controversy, rhetoric, and calls for reform is any analysis of *Miranda*'s actual effect on American police interrogation practices in routine felony cases. In the predecessor to this Article, I provided the first empirical study of American police interrogation practices in more than two decades.[21] In this Article, I will evaluate the long-term impact of the well-known *Miranda* decision on contemporary police attitudes, behavior, and culture. Both articles are based on extensive empirical research on the history and sociology of American police interrogation practices, including almost 200 police interrogations I observed in more than nine months of participant observation fieldwork inside the criminal investigation divisions of three police departments.[22] In Part II of this Article, I review the history and evolution of judicial attempts to regulate police interrogation methods through the constitutional law of criminal procedure. In Part III, I summarize and critique the empirical literature on the short-run impact of *Miranda* (1966-1973). In Part IV, I analyze the impact that *Miranda* continues to exert on contemporary police practices and ideology almost thirty years after its judicial creation. In Part

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17 *See* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRETRIAL INTERROGATION (1986), *reprinted in* 22 U. MICH. J. L. REF. 437 (1989).

18 Fred Inbau has long called for the abolition of *Miranda*. *See* Fred E. Inbau, *Over-Reaction—The Mischief of* Miranda v. Arizona, 73 J. CRIM. L. & CRIMINOLOGY 797 (1982); Fred E. Inbau & James P. Manak, Miranda v. Arizona—*Is it Worth the Cost?*, 24 CAL. W. L. REV. 185 (1988).

19 *See, e.g.*, JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW (1993); Caplan, *supra* note 11; Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996); Phillip E. Johnson, *A Statutory Replacement for the* Miranda *Doctrine*, 24 AM. CRIM. L. REV. 303 (1986).

20 *See* Paul G. Cassell, *How Many Criminals Has* Miranda *Set Free?*, WALL ST. J., Mar. 1, 1995, at A15; Russel G. Ryan, *Breaking* Miranda's *25 Year Grip*, CHI. TRIB., June 11, 1991, at 19; Bruce Fein, Miranda's *Age is Beginning to Show*, WASH. TIMES, Feb. 27, 1987, at 10; Joseph Grano, Meese v. Miranda; *For Justice's Sake This Law Must Go*, DETROIT FREE PRESS, Feb. 20, 1987, at 9A; Editorial, *Heeding* Miranda's *Warning*, WALL ST. J., Feb. 2, 1987, at 22; Joseph Grano, *Law Ties Up Police While Protecting Criminals*, B. GLOBE, Feb. 1, 1987, at A27; Paul Kamenar, *It Allows Guilty People to Go Free*, N.Y. TIMES, Jan. 25, 1987, at E5; Edwin Meese III, *Square* Miranda *Rights with Reason*, WALL ST. J., June 3, 1986, at 22.

21 Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996).

22 *See* Richard A. Leo, Police Interrogation in America: A Study of Violence, Civility, and Social Change (1994) (unpublished Ph.D. dissertation, University of California, Berkeley).

V, I enter the debate about *Miranda*'s continuing viability and reform, evaluating the ongoing desirability of *Miranda* as public policy. Finally, in Part VI, I argue for the adoption of a constitutional rule that requires *as a matter of due process* the electronic videotaping of custodial interrogations in all felony cases.

II. A Historical Overview of Confession Law

Since the late nineteenth century, police interrogation practices have been regulated by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.[23] In the mid-1880s, the Supreme Court began to evaluate the admissibility of confessions under the Due Process Clause of the Fourteenth Amendment.[24] According to this doctrine, confessions were admitted only if they had been given voluntarily; confessions were excluded if the suspect's will had been overborne by police pressures. Although a coerced (i.e., involuntary) confession has been inadmissible in federal cases since the late nineteenth century,[25] the Supreme Court did not proscribe physically coercive practices in state cases until 1936. In *Brown v. Mississippi*,[26] three black tenant farmers were whipped and pummelled by sheriff's deputies investigating the murder of a white planter. The deputies hung one of the suspects from a tree, let him up and down several times, and then whipped him (both while tied to the tree and subsequently on the roadside) until he confessed.[27] The deputies arrested the other two suspects, stripped and placed them over chairs, and then severely beat and bloodied both suspects with buckled leather straps until they confessed.[28] The U.S. Supreme Court unanimously reversed the convictions of all three suspects, holding that such police methods violated the Due Process Clause of the Fourteenth Amendment.[29]

Brown v. Mississippi established the basis for the Fourteenth Amendment "voluntariness" doctrine as the due process test for assessing the admissibility of confessions in state cases.[30] Under this standard, the admissibility of a confession was evaluated on a case by

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[23] A full summary of the historical development of the constitutional law of criminal procedure that regulates police interrogation is beyond the purposes and scope of this article. For a more complete account, see Yale Kamisar et al., Modern Criminal Procedure: Cases, Comments, and Questions (8th ed. 1994).

[24] *Id.* at 440-649.

[25] *Id.*

[26] Brown v. Mississippi, 297 U.S. 278 (1936).

[27] *Id.* at 281.

[28] *Id.* at 282.

[29] *Id.* at 287.

[30] *See* Kamisar et al., *supra* note 23, at 440-649.

case basis according to the "totality of the circumstances," which included the facts of the case, the personal characteristics and background of the suspect (e.g., age, intelligence, education, prior contact with authorities), and the conduct of the police during interrogation.[31] Only confessions that were the product of a free and rational will were admissible.[32] In the thirty-five confession cases the Supreme Court decided from 1936 to 1964, it employed the due process voluntariness test not only to evaluate the admissibility of confessions, but also to circumscribe appropriate and inappropriate interrogation practices, typically by reducing the degree of psychological pressure permissible for a legally voluntary confession.[33] During these years, the Supreme Court designated certain police interrogation methods—including physical force, threats of harm or punishment, lengthy or incommunicado questioning, solitary confinement, denial of food or sleep, and promises of leniency—as presumptively coercive and therefore constitutionally impermissible.[34]

The initial rationale underlying the voluntariness standard was that overbearing police methods created too high a risk of false confession and were not likely to yield factually reliable information from the accused. Indeed, this rationale or guiding principle was consistent with the earlier common law rule that only trustworthy confessions could be admitted into evidence against a criminal suspect.[35] But in 1941 the Supreme Court introduced the criterion of substantive due process or fairness into the Fourteenth Amendment voluntariness analysis.[36] In subsequent confession cases, the Supreme Court ruled that confessions obtained by unfair police methods may be involuntary despite the confession's apparent veracity.[37] Whether in the context of searches or interrogations, evidence gathered by police methods that "shocked the conscience" of the community or violated a fundamental standard of fairness were to be excluded, regardless of its truth or falsity.[38] As the Fourteenth Amendment voluntariness doctrine evolved, the Supreme Court sought both to guard against the

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31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

35 3 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 822 (James H. Chadbourn rev., 1970).

36 Lisenba v. California, 314 U.S. 219 (1941). The Supreme Court in *Lisenba* wrote, "[t]he aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." *Id.* at 236.

37 *See* Rogers v. Richmond, 365 U.S. 534 (1961); Stein v. New York, 346 U.S. 156 (1953); Malinski v. New York, 324 U.S. 401 (1945); Ashcraft v. Tennessee, 322 U.S. 143 (1944).

38 Rochin v. California, 342 U.S. 165 (1952).

conviction of the innocent as well as to deter offensive police interrogation methods. As Gerald Caplan has noted, the voluntariness test:

> [B]ecame a vehicle for evaluating not only the effect of interrogative techniques on a suspect's will but also the propriety of police conduct, isolated from and unrelated to its impact on the suspect. . . . In short, after nearly thirty years of judicial development, the voluntariness test was an evolving moral inquiry into what was decent and fair in police interrogation practices.[39]

The voluntariness test thus became the touchstone of due process in confession cases as the Supreme Court sought to strike an appropriate balance between protecting the rights of the criminally accused and allowing police to employ effective interrogation methods.

Since 1964, police interrogation practices have also been under the potential regulation of the Sixth Amendment's right to counsel. While Americans have enjoyed a constitutional trial right to counsel in federal cases since the ratification of the Bill of Rights in 1791, this right was first incorporated into state constitutions through the Fourteenth Amendment in capital offenses in 1932[40] and subsequently modified in 1963 to include all felony offenses.[41] The underlying rationale of the Sixth Amendment is to protect a suspect's right to a fair trial. Extending this Sixth Amendment trial right to an earlier stage in the criminal process, the Supreme Court in 1964 held that a suspect was entitled to the protections of the Sixth Amendment upon indictment.[42] The Supreme Court subsequently held that a suspect has a right to legal representation as soon as judicial proceedings have been initiated against him, whether by formal charge, preliminary hearing, indictment, information, or arraignment.[43] Consequently, once judicial proceedings have commenced, police cannot interrogate a suspect about matters relating to those proceedings absent an explicit relinquishment (i.e., a knowing and voluntary waiver) of the suspect's Sixth Amendment right to legal representation.[44]

Only five weeks after *Massiah*[45] established that post-indictment questioning of a defendant outside the presence of his lawyer violates the Sixth Amendment, the Supreme Court in *Escobedo v. Illinois*[46] once again analyzed the appropriate role of counsel during interrogation. In *Escobedo*, police denied Escobedo, an indicted suspect, access to his

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39 Caplan, *supra* note 11, at 1430, 1433.
40 Powell v. Alabama, 287 U.S. 45 (1932).
41 Gideon v. Wainwright, 372 U.S. 335 (1963).
42 Massiah v. United States, 377 U.S. 201 (1964).
43 Brewer v. Williams, 430 U.S. 387 (1977); Kirby v. Illinois, 406 U.S. 682 (1972).
44 *See generally*, WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE (1992).
45 377 U.S. at 201.
46 378 U.S. 478 (1964).

attorney (whom he had repeatedly requested to see), just as they had denied his attorney access to the Homicide Bureau where Escobedo was being interrogated.[47] Although it overturned Escobedo's conviction, the Supreme Court limited the holding of *Escobedo* to the facts of the case.[48] However, while it lacked precedential value, the *Escobedo* decision was significant for marking a historical turn in the law of confessions that paved the way for the well-known *Miranda* decision. In *Escobedo*, the Supreme Court appeared to criticize police interrogation of custodial suspects in the absence of counsel as well as the use of confession evidence in an accusatorial system of justice.[49] To its critics, however, the Supreme Court appeared to be creating new constitutional rights inside the stationhouse.[50] Indeed, the law enforcement community feared that one purpose of *Escobedo* was to put police and prosecutors on notice that the Supreme Court was preparing to announce a broad Sixth Amendment right to counsel inside the stationhouse. Although the Supreme Court never did mandate the presence of counsel at the stationhouse or extend the Sixth Amendment trial right to the interrogation process as police and prosecutors had feared, many of the law enforcement community's concerns turned out, nevertheless, to be justified.

Only two years later in 1966, the Supreme Court handed down *Miranda v. Arizona*,[51] the most significant development in the law of confessions and possibly the most famous court case in American history. In *Miranda*, the Supreme Court applied the Fifth Amendment

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47 *Id.* at 480-81.

48 In *Escobedo*, the Court declared:

> We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and has been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.

Id. at 490-491 (citation omitted).

49 For example, the Court wrote that: "[A] system of law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation," and

> No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.

Id. at 490.

50 Irving Anolik et al., *A Forum on the Interrogation of the Accused*, 49 CORNELL L.Q. 382 (1964).

51 384 U.S. 436 (1966).

privilege against self-incrimination—that "no person should be compelled in any criminal case to be a witness against himself"[52]—to the law of confessions.[53] Based on this constitutional privilege, the *Miranda* Court held that police must announce to the criminally accused their rights of silence and appointed counsel before any custodial questioning can legally commence,[54] procedural safeguards which by now are so familiar that they have become part of American folklore. The typical *Miranda* warning reads as follows:

1) *You have the right to remain silent.*
2) *Anything you say can and will be used against you in a court of law.*
3) *You have the right to an attorney.*
4) *If you cannot afford an attorney, one will be appointed for you free of charge.*

Do you understand each of these rights I have read to you?

Having these rights in mind, do you wish to speak to me?[55]

In addition to requiring these warnings, the Court held that the state bears the burden of demonstrating that the suspect's waiver of these constitutional rights was made "voluntarily, knowingly, and intelligently."[56]

Despite the Court's attempt to ground these new rules in its earlier jurisprudence, the holding in *Miranda* represented an innovation in the constitutional law of criminal procedure. Aside from a few early and inconsequential federal confession cases in the late nineteenth century,[57] the Fifth Amendment had played no role in the judicial regulation of police interrogation practices prior to *Miranda*. One of the intended goals of the new *Miranda* rule was to displace the subjective, case-by-case due process voluntariness approach with an objective standard that applied equally to all cases. Accordingly, the Court required the fourfold *Miranda* warnings in all cases in which "questioning [was] initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in a significant way."[58] As soon as a suspect waived his or her *Miranda* rights, however, the due process voluntariness test once again became the constitutional standard for judging the coerciveness of the interrogation and thus the admissibility of any resulting confession.

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52 U.S. CONST. amend V.

53 Miranda v. Arizona, 384 U.S. 436, 467 (1966).

54 *Id.* at 444.

55 Some departments add a fifth warning informing the suspect that if he desires a lawyer, no further questions will be asked until the lawyer is present. *See* FRED E. INBAU ET AL., CRIMINAL INTERROGATIONS AND CONFESSIONS 232 (3d ed. 1986).

56 *Miranda*, 384 U.S. at 444.

57 *See, e.g.*, Bram v. United States, 168 U.S. 532 (1897).

58 *Miranda*, 384 U.S. at 444.

Although the Warren Court appeared to fashion the *Miranda* warnings from whole cloth, the privilege against compelled self-incrimination has enjoyed a long history in Anglo-American law as a bulwark against oppressive state questioning.[59] The privilege against self-incrimination has its roots in the struggle between church and state in medieval England and evolved as a shield against religious persecution. The early ecclesiastical courts and subsequently the King's Courts of the Star Chamber and High Commission were empowered to place English citizens under the oath *ex officio* and subject them to inquisitorial questioning on any subject matter.[60] Although they were frequently placed under the oath *ex officio* without knowing either the identity of their accusers or the nature of the charges and evidence against them, suspects were nevertheless required to answer all questions truthfully or face a fine or punishment at will for perjury.[61] The *ex officio* oaths therefore frequently required compelled self-incriminating testimony.[62] In 1637 Freeborn John Lilburne, who had been arrested for importing and printing books which were alleged to be heretical, refused to take a legal oath and answer questions before the Star Chamber.[63] For this heresy he was publicly whipped and pilloried, then jailed.[64] Several years later when the Stuarts were no longer in power, the House of Lords vacated Lilburn's sentence and provided him with reparations. Lilburn's refusal to answer questions before the Court of Star Chamber subsequently came to represent the idea that no man should be compelled to testify against himself, a right that citizens commonly began to assert in criminal trials. By the end of the seventeenth century, the privilege against compelled testimony had become a well-established common law right, and approximately one century later it was elevated to constitu-

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59 It was, in its origins, unquestionably the invention of those who were guilty of religious crimes, like heresy, schism, and nonconformity, and, later, of political crimes like treason, seditious libel, and breach of parliamentary privilege—more often than not, the offense was merely criticism of the government, its policies, or its officers.

STEPHEN A. SALTZBURG, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 442 (4th ed. 1992) (quoting LEONARD W. LEVY, THE ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF INCRIMINATION 331-32 (1968)).

60 SALTZBURG, *supra* note 59, at 440.

61 *Id.*

62 *Id.*

63 JOHN KAPLAN ET AL., EVIDENCE: CASES AND MATERIALS 569 (7th ed. 1992).

64 For refusing to respond to the questions, Lilburne was fined, was tied to a cart and, his body bared, was whipped through the streets of London. At Westminster he was placed in a pillory—his body bent down, his neck in the hole, and his lacerated back bared to the midday sun; there he stood for two hours and exhorted all who would listen to resist the tyranny of the bishops. Refusing to be quiet, he was gagged so cruelly that his mouth bled. After all this, he was kept in solitary confinement in the Fleet Prison with irons on his hands and legs and without anything to eat for ten days. *Id.*

tional status in the Bill of Rights to the United States Constitution. Notably, however, the common law (and subsequently constitutional) right not to be compelled to accuse oneself of a crime extended only to trials, and therefore did not apply to out-of-court confessions.[65]

According to the Supreme Court in *Miranda*, modern police interrogation was fundamentally at odds with the privilege against self-incrimination. For contemporary police interrogation, the Court argued, contains inherently compelling pressures that threaten to undermine a suspect's rational capacity to provide information freely to police. The Court wrote: "The very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[66] What rendered modern interrogation inherently compelling from the Court's perspective, however, was the combination of incommunicado custody in a police-dominated atmosphere with psychological pressures and inducements to confess.[67] After an extended analysis of leading police training manuals,[68] the Court argued that even the most "enlightened and effective" interrogation techniques relied on psychological manipulation, intimidation, and trickery for their efficacy, thus threatening to overbear a suspect's will and violate the dignity and liberty interests the constitutional privilege against self-incrimination was intended to protect. According to the Court, the Fifth Amendment privilege against self-incrimination required procedural safeguards prior to any custodial questioning in order to dispel the compelling atmosphere of police interrogation:

> We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.[69]

By positing that the informal pressure to speak during custodial police questioning—pressure not backed by compulsory legal process or the

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65 *See* LEVY, *supra* note 59.

66 Miranda v. Arizona, 384 U.S. 438, 455 (1966).

67 *Id.* at 445-46.

68 The *Miranda* court turned to the police texts for its empirical analysis of interrogation practices because, it pointed out, "Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms." *Id.* at 448. At the same time, however, the Court argued that "[t]hese texts professedly present the most enlightened and effective means presently used to obtain statements through custodial interrogation." *Id.* at 448-49.

69 *Id.* at 461.

threat of formal sanctions—could constitute compulsion within the meaning of the Fifth Amendment, the Supreme Court broke with earlier precedents that previously had applied the privilege against self-incrimination only to formal legal proceedings.[70] The result was one of the most influential constitutional innovations in the history of American law.

III. THE SHORT-TERM IMPACT OF *MIRANDA* REVISITED: 1966-1973

A. INTRODUCTION

In the last three decades, legal scholars have devoted tremendous energy to ruminating over the implications of *Miranda*.[71] Although virtually all of the scholarship on *Miranda* has been doctrinal and philosophical, several studies have examined the impact of *Miranda* on law enforcement and whether it has been successful in achieving its declared goals.[72] Surprisingly, however, all of these impact studies were undertaken within three, and published within eight, years of the *Miranda* decision, and none have been subsequently replicated. Thus, everything we know to date about the impact of *Miranda* comes from research that was undertaken when *Miranda* was still in its infancy. Since the long-range impact of a court decision is far more

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70 Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435 (1987).

71 Robert Tucker has estimated that seventy-five law review articles a year are written on *Miranda*, which, if true, would total more than 2,000 law review articles since *Miranda* became law. *See* Robert Tucker, *Protecting the Guilty—True Confessions: The Long Road Back to* Miranda, THE NAT'L REV., Oct. 1985, at 28.

72 *See* NEIL A. MILNER THE COURT AND LOCAL LAW ENFORCEMENT: THE IMPACT OF MIRANDA (1971); DAVID W. NEUBAUER, CRIMINAL JUSTICE IN MIDDLE AMERICA (1974); John Griffiths & Richard Ayres, *Faculty Note, A Postscript to the* Miranda *Project, Interrogation of Draft Protesters*, 77 YALE L. J. 395 (1967); Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of* Miranda, 47 DENV. L. J. 1 (1970); Richard Medalie et al., *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement* Miranda, 66 MICH. L. REV. 1347 (1968); Neil A. Milner, *Comparative Analysis of Patterns of Compliance*, 5 LAW & SOC'Y REV. 119 (1970); David W. Neubauer, *Confessions in Prairie City: Some Causes and Effects*, 65 J. CRIM. L. & CRIMINOLOGY 103 (1974); Cyril D. Robinson, *Police and Prosecutor Practices and Attitudes Relating to Interrogation as Revealed by Pre- and Post-*Miranda *Questionnaires: A Construct of Police Capacity to Comply*, 3 DUKE L.J. 425 (1968); Roger C. Schaefer, *Patrolman Perspectives on* Miranda, 1971 LAW & THE SOC. ORD. 81 (1971); Richard Seeburger & R. Stanton Wettick, Jr., Miranda *in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1 (1967); Otis Stephens et al., *Law Enforcement and the Supreme Court: Police Perceptions of the* Miranda *Requirements*, 39 TENN. L. REV. 407 (1972); Michael Wald et al., *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L. J. 1519 (1967); James W. Witt, *Non-Coercive Interrogation and the Administration of Criminal Justice: The Impact of* Miranda *on Police Effectuality*, 64 J. CRIM. L. & CRIMINOLOGY 320 (1973); Evelle J. Younger, *Interrogation of Criminal Defendants—Some Views on* Miranda v. Arizona, 35 FORDHAM L. REV. 255 (1966); Evelle J. Younger, *Results of a Survey Conducted in the District Attorney's Office of Los Angeles County Regarding the Effect of the* Miranda *Decision Upon the Prosecution of Felony Cases*, AM. CRIM. L. Q. 32 (1966).

important to scholars than its short-term effects,[73] it is surprising that no scholar has studied the impact of *Miranda* in more than two decades.[74]

The *Miranda* impact studies employed a variety of methodologies, including participant observation, analysis of case files, interviews, and surveys. The general consensus of these studies included the following: after initially adjusting to the new rules propounded in the *Miranda* decision, police complied with the letter, but not the spirit, of the required fourfold warnings; despite these standard warnings most criminal suspects routinely waive their constitutional rights; the *Miranda* rules have had only a marginal effect on the ability of the police to successfully elicit admissions and confessions from criminal suspects; and therefore, *Miranda* has not exercised a significant impact either on the rates of apprehension or conviction of criminal suspects.[75] The general view of these studies is not merely that *Miranda* has failed to adversely affect the ability of police to control crime, but also that, in practice, the requirement of standard *Miranda* warnings has failed to achieve the goal or impact originally envisioned by the Warren Court. In this section, I will review and critique these early empirical studies in order to lay the basis for my own, more contemporary (qualitative and quantitative) contribution to this literature.

B. THE *MIRANDA* IMPACT STUDIES: 1966-1973

In one of the earliest yet most widely cited studies, a team of Yale law students spent eleven weeks in the summer of 1966 observing 127 interrogations inside the New Haven Police Department, as well as interviewing twenty-five detectives and fifty-five lawyers.[76] The Yale study assessed the implementation of the *Miranda* decision and the effect(s) of the warnings on the behavior of both police detectives and criminal suspects prior to and during interrogation.[77] The researchers found that in the immediate aftermath of *Miranda* the detectives virtually ignored the decision altogether, frequently failing to recite

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[73] Malcolm M. Feeley, *Power, Impact, and the Supreme Court, in* THE IMPACT OF SUPREME COURT DECISIONS 218-44 (Theodore Becker & Malcolm Feeley eds. 2d ed. 1973).

[74] In addition to my own empirical study of *Miranda*'s impact, Paul G. Cassell & Bret S. Hayman have recently undertaken an empirical study of *Miranda*'s impact that will shortly appear in another journal. Paul G. Cassell & Bret S. Hayman *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 U.C.L.A. L. REV. (Forthcoming, 1996). Since this study's results were not published when this Article was written, I do not include them in my summary here.

[75] For a contrary view, see Cassell, *supra* note 19, at 387-446; Caplan, *supra* note 11, at 1464-67.

[76] *See* Wald, *supra* note 72, at 1523, 1528.

[77] *Id.* at 1521-22.

part or all of the required warnings to suspects in custody (only twenty-five of the 118 suspects questioned received all four warnings required by *Miranda*).[78] After the initial transition period, however, the New Haven detectives adjusted their procedures and complied more readily with the letter, though not the spirit, of the norms set forth in *Miranda*.[79] Nevertheless, the detectives viewed the required warnings as an artificial and unnecessary obstacle in the interrogation process and the *Miranda* decision itself as "a statement that police are nasty people, who cannot be trusted to treat a suspect in a civilized manner."[80] Not surprisingly, the quality of the warnings varied inversely with the strength of the evidence and directly with the seriousness of the offense, suggesting that detectives delivered more adequate warnings when failure to do so might jeopardize the admissibility of a highly valued confession.[81] Yet the detectives often intoned the warnings in a mechanical, bureaucratic manner so as to trivialize their potential significance and minimize their effectiveness, sometimes coaxing ambivalent suspects into waiving their rights.[82] According to the authors, most persons appeared unable to grasp the significance of their *Miranda* rights, and thus *Miranda* had little effect on a suspect's willingness to cooperate with police detectives. As Wald et al. noted:

> In sum, our data indicate that the *Miranda* warnings have not been notably successful in protecting those who needed them, regardless of who they are. . . . [I]t seems from all of our data that the *Miranda* warnings will not silence suspects and therefore will not cripple law enforcement as critics have claimed. The opposite side of this coin, however, is that warnings do not seem significantly to help the suspect to make a "free and informed choice to speak or assert his right to stand silent."[83]

According to the authors, only a few suspects refused to speak to police or requested counsel prior to questioning,[84] and in only six of 127 (approximately 5%) of the cases did the *Miranda* requirements adversely affect the ability of police to obtain a confession that the researchers judged necessary for conviction.[85] In addition, the researchers noted that *Miranda* appeared to have little impact on police behavior during interrogation, since detectives continued to em-

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78 *Id.* at 1550-51.

79 *Id.* at 1551.

80 *Id.* at 1611.

81 *Id.* at 1553-55.

82 *Id.* at 1552.

83 *Id.* at 1578 (quoting *Miranda*, 384 U.S. at 467-68).

84 However, the authors point out that 43 of the 118 suspects questioned (approximately 36%) expressed a desire to terminate their interrogations. The detectives honored these requests in 26 (approximately 60%) of those interrogations. *Id.* at 1554-56.

85 *Id.* at 1565-67.

ploy many of the psychological tactics of persuasion and manipulation that the Warren Court had deplored in *Miranda*.[86]

In a postscript to the Yale Study, several of the same researchers assessed the impact of *Miranda* under circumstances far different from those of the initial study. The researchers interviewed twenty-one Yale students (both undergraduate and graduate), staff, and faculty who had refused to turn in their draft cards and were subsequently interrogated by FBI agents for their civil disobedience.[87] Unlike the typical police interrogation, the suspects had not been arrested, the interrogation took place at the suspects' homes or offices, and the suspects had been of equal or higher social status than the FBI agents.[88] Nevertheless, the suspects were frequently nervous, they typically waived their *Miranda* rights (which had been given begrudgingly, if politely), and many of the suspects provided their interrogators with incriminating information.[89] The researchers concluded that despite the widespread publicity of the *Miranda* decision, these well-educated and highly intelligent individuals did not understand their constitutional rights.[90] Griffiths and Ayres argued that:

> Our interviews reinforce the conclusions of the *Miranda Project* that the psychological interaction between the interrogator and the suspect in an interrogation is extremely subtle, and the interrogator has most of the advantages . . . . [T]he *Miranda* warnings are almost wholly ineffective, and this obtains even when the suspect is intelligent, and the interrogation is polite, non-custodial, and at the suspect's home.[91]

Several of the early *Miranda* impact studies relied on broad surveys of existing police practices to assess the impact of *Miranda* warnings and violations on the apprehension and prosecution of criminal suspects. Shortly after the *Miranda* decision, Younger administered a survey to the members of the Los Angeles Country District Attorneys' Office at the complaint stage (1,437 felony cases), preliminary stage (665 defendants), and trial stage of prosecution (678 cases).[92] Comparing the results of this survey to one administered in the same office a year earlier following a California Supreme Court decision extending protection to in-custody suspects,[93] Younger con-

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86 However, at the same time Wald et al. noted that "most suspects interrogated in New Haven do not face the massed array of interrogation techniques paraded by the Court in *Miranda*." *Id.* at 1549.

87 *See* Griffiths & Ayres, *supra* note 72, at 300.

88 *Id.* at 306.

89 *Id.* at 314, 318.

90 *Id.* at 313-14.

91 *Id.* at 318.

92 *See* Younger, *supra* note 72.

93 People v. Dorado, 398 P.2d 361 (Cal. 1965). As Younger states,

> The *Dorado* decision held that when (1) the investigation is no longer a general in-

cluded the following: (1) police officers began complying with *Miranda* immediately; (2) the required warnings did not reduce the percentage of admissions and confessions made to officers in cases that reached the complaint stage;[94] (3) the *Miranda* requirements did not decrease the percentage of felony complaints issued by prosecutors or the success in prosecuting cases at the preliminary stage; and (4) while the *Miranda* decision *because of its retroactive application* had caused some admissions and confessions to be excluded from trial proceedings, it did not appear to undermine the prosecutor's ability at the trial stage in cases in which police obtained extra-judicial statements after June 13, 1966, the date of the *Miranda* decision.[95]

The prosecutors' offices in several other cities conducted surveys of the confession rates in the period immediately prior and subsequent to the *Miranda* decision. Although these findings were not published, they were reported in testimony before the Subcommittee on Criminal Laws and Criminal Procedures.[96] Philadelphia District Attorney Arlen Specter reported that in the nine months preceding *Miranda,* 68% of arrested suspects provided Philadelphia Police with statements, whereas in the seven months following *Miranda* only 41% of arrested suspects provided Philadelphia Police with statements.[97] New York County District Attorney Frank Hogan reported that suspects provided police with incriminating statements in 49% of the non-homicide felony cases in New York County (that reached the grand jury stage) in the six months prior to *Miranda,* but that in the six months following *Miranda* only 15% of the cases involved such statements. Kings County District Attorney Aaron Koota reported that prior to *Miranda* only 10% of the suspects refused to make statements to police, whereas in the first three and one-half months following

quiry into an unsolved crime but has begun to focus on a particular suspect, (2) the suspect is in custody, (3) the authorities are carrying out a process of interrogations that lends itself to eliciting incriminating statements, then the suspect must be effectively informed of his right to counsel and his absolute right to remain silent.

Younger, *supra* note 72, at 35, n.5. (results of a survey conducted in Los Angeles County regarding the effect of the *Miranda* doctrine upon the prosecution of felony cases).

94 Only 1% of the cases surveyed did not reach the complaint stage specifically due to *Miranda* violations. Younger, *supra* note 72, at 36.

95 *Id.* at 33-39.

96 *See Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary,* 90th Cong., 1st Sess. 200-19 (1967).

97 Beginning in October 1965 the Detective Division of the Philadelphia Police Department compiled the number of arrested suspects who refused to provide statements to police after receiving warnings of their rights. From October 17, 1965 to June 11, 1966 32% of the 4,891 suspects arrested refused to provide statements after the warnings; from June 19, 1966 through February 25, 1967, 59% of the 5,220 suspects arrested refused to provide police with statements. *See* Harold E. Pepinsky, *A Theory of Police Reaction to* Miranda v. Arizona, 16 CRIME & DELINQ. 379, 382 (1970).

Miranda, 41% of the suspects in the same crime categories refused to provide statements to police. Although these three unpublished (and largely unexplained) studies purported to establish that *Miranda* seriously damaged law enforcement, they have been criticized for their severely flawed methodology.[98]

In a more sophisticated analysis of the impact of the *Miranda* requirements on confession and conviction rates, Seeburger and Wettick examined several hundred confessions from the felony case files of the Detective Branch of the Pittsburgh Police Bureau from July 1964 through June 1967.[99] Seeburger and Wettick discovered that the Detective Branch had a policy of warning suspects of their rights to silence for ten to twenty-five years prior to the advent of *Miranda* and that since the *Escobedo v. Illinois* decision in 1964 they had regularly warned suspects of their right to counsel as well.[100] To be sure, these warnings were not necessarily provided clearly or at the beginning of an interrogation, and the detectives sometimes attempted to persuade

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98 *See* Robert Leibowitz, The Psychology of Police Confession and the Impact of Miranda: A Study of Interrogation Methods Over a 50 Year Period (1991) 8-92 (Unpublished Ph.D dissertation, University of California (Santa Cruz) (1991)). *See also* Schulhofer, *supra* note 70, at 457-58. As part of another unpublished project, the Vera Institute conducted two parallel studies, "The Manhattan Survey" and "The 20 Precinct Interrogations," of interrogations in New York City in 1967. The purpose of both studies was to evaluate the value of audio-recording custodial interrogations. In the first study, the Institute collected data on 1,460 audio-recorded custodial interrogations of suspects in felony and "fingerprintable misdemeanors" in the 20th precinct of New York City from April to October 1967. In the second study, the Vera Institute collected data on 768 non audio-recorded custodial interrogations in the remaining 22 Manhattan precincts in New York City from August to September 1967. Both studies reported a surprisingly high rate of invocations (68.3% in the first study, 58.09% in the second) and a surprisingly low rate of confessions and admissions (17.6% in the first study, 23.7% in the second). Both studies also suggested that the invocation of *Miranda* rights was inversely related to the seriousness of the offense. Yet, as the authors themselves acknowledge, neither study offers much information relevant to *Miranda's* impact on custodial interrogations (neither study contained pre-*Miranda* data nor assessed the rate or quality of compliance with *Miranda*), and both studies are so methodologically primitive as to be distinctly unhelpful: both collect data only on a few variables, the coding of the variables changes from one study to the next, the variables are not systematically organized, and any observed differences are not subjected to tests of statistical significance. *See* VERA INSTITUTE OF JUSTICE, MONITORED INTERROGATIONS PROJECT FINAL REPORT: STATITISTICAL ANALYSIS (1967). *See also* VERA INSTITUTE OF JUSTICE, TAPING POLICE INTERROGATIONS IN THE 20TH PRECINCT, N.Y.P.D. (1967). For a brief review of these studies, see P. MORRIS, POLICE INTERROGATION: REVIEW OF THE LITERATURE 35-36 (1980).

99 *See* Seeburger & Wettick, *supra* note 72. Seeburger and Wettick examined each of the detective division's files for the following crimes: homicide, forceful sex, robbery, burglary (including receiving stolen goods), and auto larceny. The Pittsburgh police bureau only created files for cases it cleared (i.e., solved). Seeburger and Wettick did not examine files for gambling, narcotic, or vice offenses. *Id.* at 6-7.

100 *Id.* at 8.

suspects not to invoke any of these rights.[101] Nevertheless, the Pittsburgh detectives began to comply with *Miranda* within a week after it became law.[102] Whereas Pittsburgh detectives obtained confessions in 54.4% of the cases surveyed prior to *Miranda*, they obtained confessions in only 37.5% of the cases following *Miranda*.[103] This drop in the confession rate varied by the type of crime studied, though it held true for each type of crime they surveyed (homicide, robbery, burglary, auto larceny) except forcible sex.[104] In the period following the *Miranda* decision, the suspect invoked his or her constitutional right to remain silent in more than 40% of the cases; the percentage of suspects making statements dropped from 48.5% to 27.1%.[105] While Seeburger and Wettick attribute this decline to the requirement of *Miranda* warnings, they argue that *Miranda* has not adversely affected law enforcement in Pittsburgh because the decline in the confession rate did not lead to a corresponding decline in the conviction rate.[106] Seeburger and Wettick thus conclude: "*Miranda* has not impaired significantly the ability of law enforcement agencies to apprehend and convict the criminal."[107]

In an attempt to measure the attitudes and practices of police and prosecutors, Robinson conducted a nationwide survey of big city police departments (population of 100,000 or more), small city police departments (25,000 or more), and prosecutors' offices prior to and after the *Miranda* decision.[108] Robinson initially sent lengthy surveys to 144 small city police departments, 144 prosecutors offices, and 150 small city police departments. Shortly after the *Miranda* decision in 1966 and again one year later in 1967, Robinson sent a more limited questionnaire to those chiefs of detectives in big cities who had responded to the initial questionnaire.[109] The initial survey revealed that in 1964, 51% of city police claimed to give the warning to silence and 46% claimed to give warnings to counsel; and 71% of small city police reported to give both warnings to silence and warnings to counsel at the outset of questioning.[110] Moreover, shortly before the *Miranda* decision, more than 90% of all three groups (big city police, small city police, and prosecutors) reported that they were providing

101 *Id.*
102 *Id.*
103 *Id.* at 11.
104 *Id.*
105 *Id.* at 13.
106 *Id.* at 18-19.
107 *Id.* at 26.
108 *See* Robinson, *supra* note 72, at 425-26.
109 *Id.* at 428.
110 *Id.* at 434-47.

suspects with warnings to silence and counsel.[111] As Robinson concedes, one must greet these self-reported findings with "knowing winks," for if police officials around the country were already delivering constitutional warnings with uniform solicitude, then surely the law enforcement community would not have reacted to *Miranda* with such bitter indignation and public outcry. Robinson argues that prior to *Miranda* the warnings had been entirely under the control of police, who could modify them on a case-by-case basis, recite them so as to ward off potential legal challenges to the admissibility of any resulting statements, and even incorporate the warnings into their stratagems for eliciting confessions. After *Miranda*, however, the detectives complained that far more suspects refused to speak to police, and that more lawyers were likely to challenge the admissibility of statements in court, resulting in a decline in both the confession and conviction rate. Robinson's study offered no evidence to confirm or disconfirm the detectives' speculations.

In another empirical study of *Miranda*, Medalie et al. examined the implementation of *Miranda* in the District of Columbia.[112] From June 1966 to June 1967, the Bar Association of the District of Columbia provided volunteer attorneys around the clock to criminal suspects inside the District of Columbia police station as part of a Neighborhood Legal Services Project.[113] Medalie et al. administered questionnaires to the volunteer attorneys who participated in this program (1,060 cases in all), and interviewed 260 arrested suspects in the District of Columbia in 1965 and 1966.[114] Medalie et al. announced as their first central finding that 40% of the suspects in the post-*Miranda* period provided statements to the police,[115] whereas 43% of the suspects in the study in the pre-*Miranda* period had provided statements.[116] The second central finding was that only 7% of the suspects arrested for felonies and serious misdemeanors in fiscal year 1967 requested counsel from the Precinct Representation Project, even though volunteer attorneys had been readily available twenty-four hours a day.[117]

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111 *Id.* at 447-52.

112 *See* Medalie et al., *supra* note 72.

113 *Id.* at 1350.

114 Medalie et al. report that 1,060 cases were assigned to attorneys by the NLSP, and that the attorneys returned questionnaires in 326 (31%) of these cases. Of the 260 defendants interviewed by Medalie et al., 175 (approximately 2/3 of the sample) had been arrested prior to the *Miranda* decision, and 85 (approximately 1/3 of the sample) had been arrested subsequent to *Miranda*. *Id.* at 1354-55.

115 *Id.* at 1351-52.

116 *Id.* at 1414.

117 *Id.* at 1352.

As with many other departments around the country, the District of Columbia Police had been providing some form of warnings to custodial suspects since the *Escobedo* decision in 1964. Based on their interviews with criminal defendants, Medalie et al. estimated that the rate at which warnings to silence and counsel were issued to arrested suspects rose from slightly over 50% prior to the *Miranda* decision to 75% after *Miranda*.[118] In addition, Medalie et al. estimated from their interviews that 15% of the post-*Miranda* defendants did not understand the right to silence warnings, 18% did not understand the right to presence of counsel warnings, and 24% did not understand the right to appointed counsel warnings.[119] Medalie et al. criticized the District of Columbia Police for implementing *Miranda* inadequately and failing to follow both the letter and the spirit of the law, concluding that the reality of *Miranda* in practice fell far short of the ideals that had been articulated by the Warren Court. Despite their righteous indignation, however, Medalie et al.'s data presentation are flawed, *for the police were not legally required to provide many of the defendants in their study with Miranda warnings.*[120] This rhetorical sleight of hand undermines the apparent validity and potential import of Medalie et al.'s findings.[121]

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118 *Id.* at 1362-63.

119 *Id.* at 1374.

120 As *Miranda* indicates, police are only required to provide warnings when they question suspects whose freedom has been restrained in a significant manner or who are under arrest. The Supreme Court has defined interrogation to mean "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). In their study, Medalie et al. refer to their interviewees as "defendants who had been subjected to arrest procedures," *Id.* at 1351, not as custodial suspects. In Table E-7, buried deeply in their clumsily organized Appendix, Medalie et al. break down the rights warnings given to interrogated vs. non-interrogated pre- and post-*Miranda* defendants. In their sample, 44 of the 85 post-*Miranda* defendants (52%) were not interrogated by the District of Columbia police and 77 of 174 pre-*Miranda* defendants (44%) were not interrogated by District of Columbia police. *Id.* at 1418. If the suspects were not interrogated, then no *Miranda* warnings were even necessary in the first place! Therefore, Medalie et al.'s data and criticisms of the implementation of *Miranda* in the District of Columbia appear to be largely fallacious, since it is utterly dishonest to criticize the police for failing to provide a large number of the defendants with *Miranda* warnings when, in fact, the police were under no legal obligation to do so.

121 For example, in their summary of findings Medalie et al. tell us that "[h]alf the defendants reported not being given the silence warning, somewhat fewer than two thirds reported not being given the station-house counsel warning, and over two thirds reported not being given all four *Miranda* warnings." *Id.* at 1394. This statement is meaningless. Forty-seven percent of these defendants (121/259) were not interrogated by police, and therefore there is no logical or legal reason to criticize police for not providing them with *Miranda* warnings. *Id.* at 1418. Medalie et al.'s method would be much like criticizing all divorced fathers in a sample for failing to pay child support when 47% of those divorced fathers did not have any children and thus were not legally required to do so in the first place. It is intellectually dishonest.

In another attempt to study the implementation of *Miranda*, Leiken assessed the impact of *Miranda* on the process and outcomes of custodial interrogations in Colorado more than two years after the *Miranda* decision.[122] Leiken interviewed fifty suspects inside the Denver County jail during July and August 1969, observed eight interrogations inside the Denver Police Department, interviewed two interrogators with the Denver Police Department, and observed a small, unspecified number of *Miranda* hearings in a Denver trial court.[123] Leiken found that Denver police typically read the *Miranda* warnings to each suspect from a standard advisement form that the suspect was then asked to sign twice, once to acknowledge that the suspect understood his rights and a second time to indicate that the suspect wished to waive them. Nevertheless, Leiken argued that the suspects in his sample inadequately understood their rights, for only 61% of the suspects he interviewed could recall the content of the right to silence warning, 48% could recall the right to counsel warnings, 40% could recall both of the warnings, and 31% recalled the content of neither warning.[124] Paradoxically, however, those suspects who best understood their rights were most likely to speak to detectives. Leiken also discovered that 45% of the suspects did not know that oral statements could be used against them in court, 60% of the suspects thought that their signatures on the waiver forms would have no legal effect on their case under any circumstances, 67% of the suspects claimed to request (while only 6% claimed to receive) counsel prior to questioning, and 27% thought that their right to counsel applied only at the trial stage.[125]

In addition, Leiken argued that police used the very psychological pressures deplored by the *Miranda* court, including promises and threats, to induce suspects to sign waiver forms and subsequently to elicit statements and confessions. Although he acknowledges that one might treat the statements of his incarcerated subjects with some skepticism and that the Denver police complied with the formal requirements of *Miranda*, Leiken nevertheless concludes that the *Miranda* rights were ineffective at dispelling the inherently compelling pressures of custodial interrogation because suspects lack the appropriate understanding to make a knowing waiver of their rights. Instead, police use the warnings to their advantage in order to overcome the evi-

122 *See* Leiken, *supra* note 72.

123 All of the suspects whom Leiken interviewed had already been interrogated by police, most for serious felonies. By contrast, the few interrogations that Leiken observed were for non-serious felonies.

124 *Id.* at 15.

125 *Id.* at 17-27.

dentiary burden of demonstrating that a voluntary statement was obtained. "Thus," writes Leiken, "the impact of *Miranda* on the ultimate interrogation contest seems to have been effectively neutralized."[126]

In another study designed to evaluate the impact of *Miranda* on the effectiveness of one police department, Witt analyzed 478 felony case files from the Police Department in "Seaside City" (a pseudonym for a city in Southern California with a population of over 80,000) during the period from 1964 to 1968.[127] Witt found that although police officers believed they were receiving far fewer admissions and confessions as a result of the *Miranda* requirements, the success rate declined only 2% (69% to 67%) from the pre-*Miranda* period to the post-*Miranda* period.[128] The percentage of cases in which suspects had provided oral admissions of guilt declined 2% as well (43% to 41%), the number of suspects who refused to talk increased 3% (6% to 9%), and the clearance rate declined 3% (19% to 16%) in the same period.[129] The conviction rate, however, declined almost 10% (92% to 83%) from the pre-*Miranda* to the post-*Miranda* period.[130]

Unfortunately, Witt did not use statistical analysis to evaluate the findings in his data, and thus we do not know whether any of these differences are statistically significant. Moreover, Witt's analysis is logically inconsistent. On the one hand, he dismisses *Miranda* as the sole cause of these declines, suggesting that it is impossible to separate out the distinct impact of *Miranda* from all the other factors that may be bringing about these changes. On the other hand, Witt suggests that two other factors are likely responsible for these declining rates—substantial plea bargaining by prosecutors and prosecutors' tendency to reduce charges in certain felony cases involving hardship to the accused—without telling us why these two factors would have changed in the short time from the pre- to the post-*Miranda* periods studied. Although he recognizes that his data do not lend themselves to generalization, Witt nevertheless argues that *Miranda* had little impact on the effectiveness of police interrogations in the cases he studied: "There is little indication from the above data that the *Miranda* requirements have materially affected the outcome of formal police in-

126 *Id.* at 48.

127 *See* Witt, *supra* note 72.

128 Witt counted an interrogation as successful "any time the police were able to get a signed confession, an oral admission of guilt, a signed incriminating statement or some type of oral incriminating evidence or other useful material for conviction." *See id.* at 325 n.43.

129 *Id.* at 325.

130 *Id.* at 329.

terrogation in Seaside City."[131] At the same time, Witt argues that the impact of *Miranda* was notable in the collateral functions of interrogation: "The police were found to be implicating fewer accomplices, clearing fewer crimes, and recovering less property through interrogation, and helping fewer suspects clear themselves."[132]

In yet another study, Neubauer examined the court records for 248 felony defendants in 1968 and conducted interviews with police, prosecutors, defense attorneys, and judges in "Prairie City," a pseudonym for a medium-sized city in central Illinois with a population of over 100,000.[133] Although only a small part of his study is devoted to *Miranda*, Neubauer focuses on the impact of *Miranda* on the courts, an emphasis neglected in earlier studies. The prosecutors, defense attorneys, and court officials in his study reported that police were generally complying with the procedural requirements of *Miranda* and providing all suspects with warnings. Neubauer notes that 69% of the defendants in his sample signed a waiver form and 46% made a written or oral admission to the police.[134] To Neubauer's surprise, however, only five pre-trial suppression motions were filed, and only one was sustained. Neubauer argues that the admissibility of confessions was rarely challenged (and even more rarely sustained) because police control the flow of information to the courts, and judges virtually always believe the police officer's testimony if a dispute over the facts arises, especially if the suspect had signed a written waiver. Thus, Neubauer notes: "The objective indicators strongly indicate that the impact of . . . *Miranda* has been minimal in Prairie City. Whether one is counting the court docket, observing in the courtroom, or talking to the participants, one finds little activity."[135] But Neubauer argues that outside the courtroom *Miranda*'s informal impact has been to cause prosecutors to monitor police adherence to procedural requirements of the law more closely and to refuse to file charges when police practices were questionable.

In perhaps the most ambitious post-*Miranda* impact study, Neil Milner comparatively analyzed the implementation and impact of *Miranda* on police attitudes in four cities in Wisconsin (Green Bay, Madison, Kenosha, and Racine) during the first fourteen months fol-

131 *Id.* at 326.

132 *Id.* at 332.

133 *See* NEUBAUER, *supra* note 72. Don Gibbons has identified "Prairie City" as Decatur, Illinois. *See* Don C. Gibbons, *Unidentified Research Cites and Fictitious Names*, 6 AM. SOC. 32, 33 (1975).

134 *See* NEUBAUER, *supra* note 72, at 104-05. Neubauer notes that he could not tell what percentage of suspects did not sign the waiver form because some were not interrogated.

135 *Id.* at 167.

lowing the decision.[136] Milner interviewed detectives and informants; observed an unspecified number of field and custodial interrogations; gathered crime and guilty plea data; and administered questionnaires to members of all four police departments. Unlike the other impact studies, Milner's unit of analysis was the police organization. Milner found that organizational acceptance of and compliance with *Miranda*'s objectives was directly related to the degree of professionalization of the department and the degree of participation by outside groups in the police decision-making process. Although some police officers in Wisconsin had been warning suspects of the right to silence and counsel prior to the advent of *Miranda*, they typically did so following a suspect's admission or confession. After the *Miranda* decision, however, police began to follow standardized procedures and regularly provide suspects with warnings of their rights prior to custodial questioning. Of course, the degree to which police organizations complied with *Miranda* and instituted formalized procedures varied by the level of professionalism of the department. Following the warnings, the informal police routines and interrogation tactics remained similar to what they had been prior to *Miranda*. Perhaps not surprisingly, Milner found that Wisconsin police viewed *Miranda* as "harmful and drastic" across all four departments, though the degree of officer disapproval of *Miranda* again varied with the level of professionalization of their department.[137] What remained similar in all four departments was that officers exercised considerable informal discretion in the use and implementation of *Miranda*. Milner also noted that in the year following the *Miranda* decision, the clearance rates went down significantly (ranging from 13-51%) in three of the four departments, though the conviction rate remained relatively constant for the two departments that provided Milner with statistics.[138]

In an attempt to measure compliance with *Miranda* by patrol officers, Schaefer interviewed sixteen rookies in Minnesota during the first year (1968) after their graduation from the police academy.[139] Schaefer administered a fourteen item questionnaire to test the rookie officers' knowledge of situations in which *Miranda* legally applies. The premise of Schaefer's study was that the patrolman's legal knowledge of the *Miranda* ruling should correlate with his compliance with *Miranda* in practice. Schaefer then went on to analyze the relationship between several independent variables and the officers scores on the *Miranda* test. Although he did not employ any tests for statisti-

136 *See* MILNER, *supra* note 72.
137 *Id.* at 219.
138 *Id.* at 217.
139 *See* Schaefer, *supra* note 72.

cal significance (indeed, his sample was too small to infer much from such differences anyway), Schaefer found a low correlation between the patrol officers' scores and their age, educational background, or father's occupation. Schaefer did find, however, that the more favorably the officers felt toward *Miranda*, the higher they were likely to score on the test. Next, Schaefer divided officers into three types: "Law Enforcers" (patrol officers who conceived of their role as authoritative enforcers of the criminal law); "Servicers" (patrol officers who conceived of their role primarily as aiding the public in any way possible); and "Law Enforcers/Servicers" (a hybrid category of the other two classifications). Schaefer found that the officers' knowledge of the legal applicability of *Miranda* in practice was highly correlated with this threefold categorization of his subjects: "Law Enforcers" scored highest on the test, while "Servicers" scored lowest. From this finding, Schaefer concluded that "those officers who feel their role to be one of 'crime control' appear to be aware of the procedural guarantees that should be extended to that group to which the *Miranda* decision and subsequent rulings were addressed."[140]

Finally, Stephens et al. conducted open-ended interviews with fifty police officers (at the rank of detective or higher) in a total of four police departments in two cities: Knoxville, Tennessee and Macon, Georgia.[141] Although Stephens et al. sought to assess the impact of *Miranda* on law enforcement in both cities, their study is more accurately characterized as a survey of police attitudes towards *Miranda* shortly after the decision. Stephens et al. argue that while most detectives adhered to the letter of *Miranda* and provided formalized warnings to suspects as a routine part of their job, *Miranda* did not change the nature and role of the interrogation process in any of the four departments studied. Rather, once a suspect waived his or her *Miranda* rights, "things continued to go on pretty much as usual."[142] Nevertheless, the detectives almost uniformly felt that *Miranda* and other Warren Court decisions had hampered their ability to investigate and solve crime effectively. The detectives also resented the *Miranda* opinion for causing greater paperwork and inconvenience, for undermining the authoritativeness of their relations with criminal suspects, and for failing to understand the exigencies of detective work. Stephens et al. maintain that the detectives' perceptions mostly lack merit, adding that the detectives for the most part did not understand the underlying rationale or policy objectives of *Miranda*. Stephens et al. conclude that *Miranda* failed to achieve its larger policy objectives:

140 *Id.* at 98.
141 *See* Stephens, *supra* note 72.
142 *Id.* at 430.

"If the impact of *Miranda* is assessed strictly from the standpoint of its tangible effect on the interrogation process, the decision may thus be regarded as an act of judicial futility."[143]

C. RE-ANALYZING THE *MIRANDA* IMPACT STUDIES

The dozen or so studies briefly summarized above constitute what has loosely come to be known as the "*Miranda* impact literature." Although these studies posed a variety of questions and employed a variety of methodologies to assess the impact of *Miranda* on custodial interrogation, the criminal process, and the police organization, the most important findings can be summarized as follows. First, in the years 1966-1969 after an initial adjustment period American police began to comply regularly with the letter of the new *Miranda* requirements. Second, despite these warnings, suspects frequently waived their constitutional rights and chose to speak to detectives. Third, once a waiver of rights had been obtained, the tactics and techniques of police interrogation did not change as a result of *Miranda.* Fourth, suspects continued to provide detectives with confessions and incriminating statements, though in some instances at a lower rate than prior to *Miranda.* Fifth, the clearance and conviction rate did not appear to be significantly affected by the *Miranda* requirements, though in some instances it too dropped. Finally, although *Miranda* may have been responsible for a 20% decline in the confession rate in one study[144] and a 10% decline in the conviction rate in two of the studies,[145] *Miranda* did not appear to undermine the effectiveness of criminal investigation in the way that the law enforcement community had initially feared. Nevertheless, the interrogation rate appeared to drop, and *Miranda* may have been responsible for lessening the effectiveness of the collateral functions of interrogation such as identifying accomplices, clearing crimes, and recovering stolen property.

Despite the full range of findings in the *Miranda* impact studies, this literature is frequently cited by legal scholars as authoritative empirical support for two propositions: first, that the requirement of pre-interrogation *Miranda* warnings has exercised only a negligible effect on the ability of police to elicit confessions, solve crimes, and secure convictions, and; second, that the *Miranda* decision did not achieve its goal of lessening the psychological pressures of police interrogations or reducing police reliance on confession evidence. These two pro-

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143 *Id.* at 431.

144 *See* Seeburger & Wettick, *supra* note 72.

145 *See* Younger, *supra* note 72, at 38-39 (results of a survey conducted in the district attorneys office of Los Angeles County regarding the effect of the *Miranda* decision on the prosecution of felony cases); Witt, *supra* note 72, at 328-30.

positions have become the conventional wisdom among scholars who typically review and cite the *Miranda* impact studies.[146]

Although the *Miranda* impact studies on the whole offer some support for each of these conclusions, the conventional wisdom overstates our actual knowledge of the impact of *Miranda* on the criminal justice process, and it misconceives the import of these early studies. Since the conventional wisdom is rarely challenged (in truth, the impact studies are rarely read anymore), scholars need to be more sensitive to the limitations of the *Miranda* impact literature, as well as the misconceptions that have been perpetuated in its name.

First, the *Miranda* impact studies are all outdated and thus are largely irrelevant for assessing the current and ongoing impact of *Miranda* in America today. The data in each of the *Miranda* impact studies was gathered during the first three years following the *Miranda* decision in the mid-to-late 1960s. Yet *Miranda* is now three full decades old. With the exception of my own,[147] and Paul Cassell and Bret Hayman's forthcoming[148] empirical research into American police interrogation practices, no scholar has gathered original data from either the 1970s, 1980s, or 1990s to evaluate the long-term impact of the *Miranda* requirements on police, courts, or the criminal justice system as a whole. The existing studies tell us little about the contemporary impact of *Miranda* not only because they all draw on data more than a quarter of a century old, but also because they capture only the initial effects of *Miranda* before police officers and detectives had fully adjusted to the new procedures. We must therefore replicate the early studies if we wish to assess meaningfully the impact of *Miranda* on today's generation of police officers and detectives. Despite the confident pronouncements about *Miranda*'s inefficacy, the truth is that we know neither the current impact nor the long-term effects of the *Miranda* decision, and thus we cannot confidently generalize

146 Thus, in two recent reviews of this literature Leibowitz concludes that "from this body of data, there is no evidence of significant 'damage' to law enforcement," while Rosenberg concludes that "in the end, then *Miranda* has failed to end the coercion of interrogation that the Court unconstitutional." *See* Leibowitz, *supra* note 98, at 136; GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE 329 (1991). Schulhofer goes even further, arguing, largely on the basis of these studies, that *Miranda* has not delivered "even a fraction of what it seems to promise." The effects of *Miranda* have been largely (if not entirely) symbolic. *See* Stephen Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 892 (1981). *See also* Lippman, *supra* note 16, at 289. For a contrary view, see Cassell, *supra* note 19.

147 *See generally* Leo, *supra* note 21; Leo, *supra* note 22. *See also* Richard A. Leo, *Police Interrogation and Social Control*, 3 SOC. & LEGAL STUD. 93 (1994); Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME, L. & SOC. CHANGE 35 (1992).

148 *See* Cassell & Hayman, *supra* note 74.

about its impact on confession and conviction rates or about the criminal process until the early studies are replicated and extended.

Second, even if we take the *Miranda* impact studies on their own terms, they are neither exhaustive nor conclusive, but offer only limited support for the conventional wisdom. One reason we must be cautious about drawing overconfident conclusions from the existing *Miranda* impact literature is that, with one or two exceptions, these studies—virtually all of which were conducted by lawyers or law professors not trained in the research methods of social science—are replete with methodological weaknesses, a fact rarely noted by the authors who invoke these studies as authoritative evidence for the proposition that *Miranda* has exercised a negligible effect on police interrogation practices. For example, some of the studies did not disaggregate the data they collected and thus lack any systematic analysis between independent and dependent variables in their sample.[149] Three of the studies that did disaggregate their quantitative data failed to employ even the most elementary statistical techniques to evaluate whether any of the pre-*Miranda* and post-*Miranda* differences observed were statistically significant.[150] More fundamentally, several of the studies suffer from selection and respondent biases that undermine the validity and generalizability of their findings. For example, Younger[151] excluded cases that did not make it to the complaint stage, Seeburger and Wettick[152] excluded cases that the Pittsburgh detectives had not cleared, Witt[153] excluded cases in which the suspect had been released, and Leiken[154] and Neubauer[155] only interviewed suspects who had been detained (rather than released) following interrogation. Also, the self-report biases in the interviews of defendants by Leiken[156] and Medalie et al.[157] and interviews of police officers by Robinson[158] and Stephens et al.[159] were not triangulated against other data to assess their validity. To be sure, the methodological difficulties of studying police interrogation practices are formidable[160] and,

149 *See* Robinson, *supra* note 72; Stephens, *supra* note 72; Medalie et al., *supra* note 72; Younger, *supra* note 72.

150 Witt, *supra* note 72; Seeburger & Wettick, *supra* note 72; Schaefer, *supra* note 72.

151 *See* Younger, *supra* note 72.

152 *See* Seeburger & Wettick, *supra* note 72.

153 *See* Witt, *supra* note 72.

154 *See* Leiken, *supra* note 72.

155 *See* Neubauer, *supra* note 72.

156 *See* Leiken, *supra* note 72.

157 *See* Medalie et al., *supra* note 72.

158 *See* Robinson, *supra* note 72.

159 *See* Stephens, *supra* note 72.

160 *See* Richard A. Leo, *Trials and Tribulations: Courts, Ethnography, And The Need For An Evidentiary Privilege For Academic Researchers*, 26 AM. SOCIOLOGIST 113-34 (1995).

strictly speaking, it is impossible to draw precise causal inferences in the study of judicial impact due to our inability to hold constant extraneous and thus potentially confounding (independent) variables.[161] Nevertheless, the methodological weaknesses of virtually all of the *Miranda* impact studies should necessarily temper, and in some instances should cause us to question, their conclusions.

Third, if we wish to understand the import of these studies and advance our knowledge of *Miranda*'s ongoing and current impact, we must dispense with the polemics that characterize much of the discussion of *Miranda*'s impact in legal scholarship. It is true that these impact studies do not provide any evidence that *Miranda* brought criminal investigation to a virtual standstill as the law enforcement community may have initially feared. Nor do these studies provide support for the Department of Justice study's more recent conclusion that *Miranda* has significantly damaged law enforcement.[162] Yet it is equally erroneous to argue[163] from these studies that *Miranda*'s effect(s) on the administration of criminal justice have been little more than symbolic. *Miranda* has had practical consequences. As the impact studies reviewed indicate, from 1966 to 1969 detectives chose to interrogate fewer suspects, and fewer suspects chose to speak to police following arrest and interrogation. Although these differences may have been small in many instances, *Miranda* may have been responsible for a 20% decline in the confession rate in one city, a 10% decline in the conviction rate in two other cities, and a significant decline in the collateral functions of interrogation, such as implicating accomplices, clearing crimes, and recovering property. Moreover, *Miranda* caused prosecutors to monitor police adherence to procedural requirements of the law more closely and to refuse to file charges when police practices were questionable. Of course, police investigators have adjusted to the *Miranda* requirements, and they continue to acquire admissions and confessions, solve crimes, and help convict criminals. But just as it is inaccurate for conservative scholars to overstate the effects of *Miranda* in calling for its abolition, it is also inaccu-

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161 Methodologically, impact studies have been premised on a quasi-experimental model in which the impact of a single decision is evaluated as if all other factors could be held constant. Since controlled experimentation is rarely, if ever, possible in the study of naturally occurring data, social scientists have traditionally relied on two positive strategies to measure judicial impact: before/after studies, and comparison-with-excluded-jurisdiction designs. While the latter method suffers from a lack of statistical comparability among jurisdictions, the former suffers from the problem of intervening factors. Thus, our inability to hold constant extraneous and thus potentially confounding (independent) variables undermines our ability to draw any precise causal inferences in the study of judicial impact.

162 *See supra* note 17, at 510-12.

163 *See* Schulhofer, *supra* note 70, at 460.

rate for liberal scholars to deny those effects when calling for the strengthening of *Miranda*. If we wish to understand the ongoing social significance of *Miranda*, we must move beyond the ideological debates between liberal and conservative legal scholars about *Miranda's* legitimacy. These debates offer no new data or insights into the impact of *Miranda* but instead continue to draw on outdated and methodologically weak studies. We must also move beyond the sterile issue of *whether Miranda* has significantly damaged law enforcement but instead pose more fundamental questions about *how Miranda* has affected police investigation practices, the administration of criminal justice, and the discourse and consciousness of other legal and social actors.

Finally, we must move beyond the misguided argument that *Miranda* failed to achieve its goals, a misconception that was first perpetuated by the *Miranda* impact studies and that has subsequently been repeated as fact in much legal scholarship. Scholars who advance this argument misconstrue the purpose of *Miranda* and overstate (or selectively cite) the findings allegedly demonstrating *Miranda*'s failures. Once again, the empirical "evidence" for such claims comes solely from the methodologically weak and outdated impact studies. In truth, however, *Miranda* has not failed to achieve its limited goals. To argue otherwise involves several misconceptions.

In *Miranda*, the Warren Court held that the warnings to silence and counsel were required prior to custodial police questioning in order to dispel the compelling pressures of interrogation. The Warren Court did not intend that the required warnings would put an end to the textbook psychological tactics it deplored nor did the Warren Court intend to lower the confession rate.[164] Although identifying the aims of any court decision is an inherently problematic endeavor, the most plausible reading of *Miranda* is that it sought quite simply to mandate a set of warnings that, prior to any interrogation, provide custodial suspects with informed knowledge both of their constitutional rights and of the uses to which any statements they make to police might be put. To the extent that police adequately apprise sus-

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164 Gerald Rosenberg suggests these mistaken interpretations. *See* ROSENBERG, *supra* note 146, at 324-30. For a contrary view, see Stephen Schulhofer, *Miranda's Practical Effect: Substantial Benefits And Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 561 (1996). As Schulhofer argues:

> If the *Miranda* Court's goal was to reduce or eliminate confessions, the decision was an abject failure. Plainly, however, the Warren Court had no such thought in mind; it explicitly structured *Miranda*'s warning and waiver requirements to ensure that confessions could continue to be elicited and used. *Miranda*'s stated objective was not to eliminate confessions, but to eliminate compelling pressure in the interrogation process.

pects of their constitutional rights to silence and counsel, and to the extent that suspects knowingly and voluntarily waive these rights prior to interrogation (if, in fact, they choose to speak to police), the limited goals of the *Miranda* decision have been reasonably achieved to that extent, the compelling pressures of police interrogation have been dispelled *according to the logic of the Miranda decision.*

The limited evidence available suggests that virtually all interrogated suspects receive standard warnings from a card, and that the great majority of those who choose to speak to police make a knowing and voluntary waiver of their rights. The *Miranda* impact studies uniformly found that after an initial adjustment police officers regularly complied with the *Miranda* requirements, typically by reading the warnings to suspects from standard advisement forms or cards. As I will discuss in more depth below, the *Miranda* warnings were read from a standard advisement form in all but two of the 182 interrogations I observed, and in those two cases the detective correctly recited the *Miranda* warnings from memory. Whether a suspect's waiver is "knowing and voluntary" requires getting inside another person's head and therefore is a far more difficult issue to assess empirically, though a couple of the *Miranda* impact studies provide very limited (and highly disputable) evidence that some suspects within the first three years following the *Miranda* decision did not fully understand their rights.[165] Several other impact studies argued that most suspects clearly did not understand their constitutional rights for otherwise they would have invoked them and refused to answer police questions.[166] This observation hardly provides persuasive evidence that

165 As mentioned in the earlier summary, Leiken asked his subjects whether they could recall the content of the *Miranda* warnings. *See* Leiken, *supra* note 72, at 15-16. Leiken found that a large percentage could not recall the contents of either or both of the warnings, and that many suspects claimed that they would not have spoken to police if they had known that oral statements could be used against them in court. *Id.* This finding is hardly persuasive evidence that suspects did not understand their rights, for inaccurate recall does not establish retrospectively that one did not knowingly waive *Miranda* at the time of questioning. Moreover, one would expect incarcerated suspects to tell an interviewer posing as a member of the public defenders' office that, in retrospect, he or she would not have provided incriminating admissions to police. The only other *Miranda* impact study that attempted to quantify a suspect's understanding of the rights was Medalie et al., who reported that 15% of their post-*Miranda* subjects did not understand the right to silence warning, 18% did not understand the right to presence of counsel warning, and 24% did not understand the warning of the right to counsel. *See* Medalie et al., *supra* note 72, at 1372-74. Since Medalie et al. categorized the response "that means just what it says" as a misunderstanding of a *Miranda* right and since a number of respondents provided this answer, the true rate of misunderstanding of the *Miranda* rights was likely much lower than Medalie et al. acknowledged. *See* Medalie et al., *supra* note 72, at 1374 n.102. Again, one must question the integrity of Medalie et al.'s analysis.

166 *See* Medalie et al., *supra* note 72; Wald, *supra* note 72; Leiken, *supra* note 72.

custodial suspects did not make a knowing and voluntary waiver of their rights since it is no evidence at all, but merely tautological reasoning. Moreover, in the only study specifically designed to measure comprehension of the words and phrases used in the *Miranda* warnings, Grisso found that approximately 85% to 90% of 260 adults interviewed (203 parolees and fifty-seven volunteers from custodial, university, and hospital maintenance crews) adequately understood their rights to silence and counsel.[167] Additionally, it bears mentioning that in the more than twenty-five years since any of the impact studies were conducted, there has been a widespread diffusion of the *Miranda* rights in American culture through television programs, movies, detective fiction, and the popular press. It is unlikely that suspects today hear the *Miranda* rights for the first time prior to police questioning. A national poll in 1984 revealed that 93% of those surveyed knew they had a right to an attorney if arrested,[168] and a national poll in 1991 revealed that 80% knew they had a right to remain silent if arrested.[169] In sum, there is little reason *prima facie* to presume that suspects do not receive standard *Miranda* warnings or that they do not waive them knowingly and voluntarily.

Thus, it appears that the implementation of *Miranda* has, in fact, reasonably achieved the Warren Court's goal of providing suspects with constitutional warnings that must be knowingly and voluntarily waived prior to any custodial police questioning. Those who argue otherwise do so by framing the policy objectives of the *Miranda* court in a way that dictates their conclusions in advance. They do so, for example, by arguing that *Miranda* has failed to significantly alter the unequal relationship between police and custodial suspects or, as we have seen, that *Miranda* has failed to lower the confession rate—as if these were the Warren Court's policy objectives.[170] Whether or not there is any merit to such arguments, their authors succeed only by replacing the actual goals of the Warren Court in *Miranda* with their own ideals or with the rhetoric of liberal activists, a point Malcolm Feeley has recently argued.[171] According to Feeley, "such a formula-

167 Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134-66 (1980). In another study (discussed in the same article) measuring comprehension of the function and significance of the rights conveyed by *Miranda* warnings in a hypothetical interrogation situation, Grisso found that 90-99% of adults adequately understood the adversarial nature of the police interrogation, 89% adequately understood the attorney-client relationship, and 78% understood that a judge cannot penalize someone for invoking his right to silence. *Id.* at 1157-60.

168 Jeffrey Toobin, *Viva* Miranda, NEW REPUBLIC, Feb. 1987, at 11-12.

169 SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950-1990, at 51 (1993).

170 *See* ROSENBERG, *supra* note 146.

171 Malcolm M. Feeley, *Hollow Hopes, Flypaper, and Metaphors*, 15 LAW & SOC. INQUIRY 745-

tion is highly problematic because the researcher him or herself has great latitude in postulating the 'goals' of the law, and thus research is constantly in danger of doing little more than revealing the gap between the law-in-action on the one hand and the researcher's own views on the other."[172] If it is to make any valuable contributions to legal scholarship, the analysis of *Miranda*'s impact must move beyond these rhetorical maneuvers.

IV. THE IMPACT OF *MIRANDA* REVISITED

A. INTRODUCTION

In this section, I will analyze *Miranda*'s impact on the detectives and cases in my sample of 182 cases at the "Laconia,"[173] "Northville",[174] and "Southville"[175] police departments. I will first provide a quantitative analysis of the effect of *Miranda* on a suspect's fate in the criminal process. Next, I will provide a qualitative analysis of the impact of *Miranda*'s impact on the cases I observed, as well as its long-term impact on the criminal process in the last three decades. I will not address whether *Miranda* has damaged law enforcement, but rather I will examine how *Miranda* has affected the organization of police interrogation practices and how *Miranda* has affected the lives of legal and social actors in the criminal justice system. I will argue that *Miranda*'s enduring impact has been to increase the level of professionalism during the investigatory stage of the criminal process and to transform the culture and discourse of modern detective work.

B. A QUANTITATIVE ANALYSIS

As we saw in the first article of this two-part series,[176] the detectives provided *Miranda* warnings to suspects in all the cases in which

60 (1992).

172 *Id.* at 748.

173 The 1990 census recorded a population of 372,242 in Laconia—approximately 43% black, 28% white, 14% Asian/Pacific Islander and 15% Hispanic. In 1992 Laconia recorded 58,668 Part I offenses (10,140 violent crimes and 48,548 property crimes), reporting an official crime rate of 123 per 1,000 members of the population.

174 As of January 1, 1994, Northville's population was 116,148. According to the 1990 census, the population of Northville is 46% white, 20% African-American, 21% Asian, and 11% Hispanic. In 1993 Northville recorded 9,360 Part I crimes (1,613 violent crimes and 7,747 property crimes), reporting an official crime rate of 80.78 per 1,000 members of the population.

175 According to U.S. Census Bureau figures for 1993, Southville reports a population of 121,064 residents. Fifty-one percent of Southville's residents are white, 24% are Hispanic, 10% are African American, and 15% are Asian. In 1993 Southville recorded 8,505 incidents of Part I crime (1,298 incidents of violent crime, 7,207 incidents of property crime), reporting an official crime rate of 70.3 per 1,000 members of the population.

176 *See* Leo, *supra* note 21.

they were legally required to do so, approximately 96% of the cases in my sample. Table 1 lists the frequency distribution for suspect's responses to *Miranda* in my sample.

TABLE 1: FREQUENCY DISTRIBUTION OF SUSPECT'S RESPONSE TO *MIRANDA* WARNINGS

Suspect's Response to *Miranda* Warnings	Freq.	Percent
Waived	136	74.73%
Changed to Waive	1	0.55
Invoked	36	19.78
Changed to Invoke	2	1.10
Not Applicable	7	3.85
Total	182	100.00

In seven (or almost 4%) of the cases I observed, the detective did not provide any *Miranda* warnings because the suspect technically was not "in custody" for the purpose of questioning. In other words, the suspect was neither under arrest nor was his freedom restrained "in any significant way" (in each case, the detective(s) informed the suspect that he did not have to answer their questions and that he was free to leave at any time). Therefore, in these seven cases the detectives were not legally required to issue *Miranda* warnings.[177] With the exception of these cases and two others in which a detective correctly recited the warnings from memory, the detective(s) read each of the fourfold *Miranda* warnings verbatim from a standard form prior to every interrogation I observed. A suspect might respond in one of four ways: waiving his rights, invoking them, or changing his initial response either to a waiver or an invocation. As Table 2 below indicates, 78% of my sample ultimately waived their *Miranda* rights, while 22% invoked one or more of their *Miranda* rights, thus indicating their refusal to cooperate with police questioning.

If a suspect chose to waive his *Miranda* rights, the custodial interrogation formally began. If a suspect chose to invoke one or more of his *Miranda* rights, typically the detective terminated the interrogation and returned the suspect (if he was under arrest) to jail. However, in seven (4%) of the cases I observed, the detectives questioned suspects even after receiving an invocation. In each of these cases, the detective(s) informed the suspect that any information the suspect pro-

177 *Miranda* warnings are legally required only "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S 436, 444 (1966).

TABLE 2: FREQUENCY DISTRIBUTION OF SUSPECT'S ULTIMATE RESPONSE TO *MIRANDA*

Whether Suspect Waived or Invoked	Freq.	Percent
Waived	137	78.29%
Invoked	38	21.71
Total	175	100.00

vided to the detective could not and would not be used against him in a court of law. The detective told the suspect that the sole purpose of questioning was to learn what really happened. Of course, what the detectives knew and did not tell the suspect was that although the prosecution could not use such evidence as part of its case-in-chief, any information the suspect provided to the detective nevertheless could be used in a court of law to impeach the credibility, and indirectly incriminate, the suspect if he chose to testify at trial.[178] In the remaining thirty-one cases in which the suspect invoked at some point during questioning (82% of all cases in which a suspect invoked a *Miranda* right), the detective(s) promptly terminated the interrogation.

As we have seen, the conventional wisdom in legal and political scholarship is that virtually all suspects waive their rights prior to interrogation and speak to the police.[179] As we saw above, however, almost one-fourth of my sample (22%) exercised their right to terminate police questioning, while 78% of the suspects chose to waive their *Miranda* rights. Nevertheless, one might expect that certain individuals are more likely to waive their rights than others. Indeed, the Warren Court in *Miranda* speculated that underprivileged suspects were less likely to be aware of their constitutional rights to silence and counsel than their more advantaged counterparts.[180] Though I tested for twelve social, legal, and case-specific variables, the only variable that exercised a statistically significant effect on the suspect's likelihood to waive or invoke his *Miranda* rights was whether a suspect had a prior criminal record ($p<.006$). As Table 3 below indicates, while 89% of the suspects with a misdemeanor record and 92% of the suspects without any record waived their *Miranda* rights, only 70% of the suspects with a felony record waived their *Miranda* rights. Put another way, a suspect with a felony record in my sample was almost four times as likely to invoke his *Miranda* rights as a suspect with no prior record

178 Harris v. New York, 401 U.S. 222 (1971).
179 *See supra* notes 71-75 and accompanying text.
180 Miranda v. Arizona, 384 U.S. 436, 471-73 (1966).

and almost three times as likely to invoke as a suspect with a misdemeanor record. This result confirms the findings of earlier studies,[181] as well as the conventional wisdom among the detectives I studied, who complained that ex-felons frequently refuse to talk to them as a matter of course. The more experience that a suspect has with the criminal justice system, the more likely he is to take advantage of his *Miranda* rights to terminate questioning and seek counsel.

TABLE 3: SUSPECT'S RESPONSE TO *MIRANDA* BY PRIOR CRIMINAL RECORD

Suspect's Prior Record	Whether Suspect Waived or Invoked		
	Waived	Invoked	Total
None	22 91.67%	2 8.33%	24 100.00%
Misdemeanor	42 89.36%	5 10.64%	47 100.00%
Felony	72 69.90%	31 30.10%	103 100.00%
Total	136 78.16%	38 21.84%	174 100.00%

Pearson chi2(2) = 10.1340 Pr = 0.006

At least as important as a suspect's response to the *Miranda* warnings is the effect that either a waiver or an invocation will exert on the processing of his case, the likelihood of conviction, and the final case resolution. Of course, a suspect's interrogation is less likely to be successful from the police perspective if a suspect invokes his *Miranda* rights ($p<.000$), yet this is neither necessarily nor obviously true. In my sample, the detectives acquired incriminating information against a suspect in six (approximately 16%) of the thirty-eight interrogations in which the suspect at some point invoked his *Miranda* rights.[182] Despite its effect on the outcome of an interrogation, a suspect's case was 4% less likely to be charged if he waived his *Miranda* rights than if he invoked his *Miranda* rights prior to or during interrogation (approximately 69% vs. 73%). While counterintuitve, this difference, as Table 4 below indicates, is not statistically significant and thus not significantly related to the prosecutor's decision to charge the suspect with a

[181] Wald, *supra* note 72, at 1644; NEUBAUER, *supra* note 72, at 105.

[182] In my sample, detectives questioned seven suspects after they had invoked their *Miranda* rights and two suspects who subsequently invoked their *Miranda* rights. Of these nine cases, six suspects provided incriminating information to detectives.

criminal offense.

TABLE 4: EFFECT OF SUSPECT'S RESPONSE TO *MIRANDA* ON PROSECUTOR'S DECISION TO CHARGE CASE

Suspect's Response ro *Miranda* Warnings	Whether Suspect Was Charged by Prosecutor		
	Not Charged	Charged	Total
Waived	42 30.66%	95 69.34%	137 100.00%
Invoked	10 27.03%	27 72.97%	37 100.00%
Total	52 29.89%	122 70.11%	174 100.00%

Pearson chi2(1) = 0.1832 Pr = 0.669

While the suspects in my sample who waived their *Miranda* rights were 4% less likely to be charged by the prosecution, they were approximately 10% more likely to be convicted of an offense than those who invoked their *Miranda* rights (63% vs. 53%). This difference may seem large, but it is not statistically significant, as Table 11 below indicates.

TABLE 5: LIKELIHOOD OF CONVICTION BY RESPONSE TO *MIRANDA*

Suspect's Response to *Miranda* Warnings	Whether Suspect Was Convicted		
	Not Convicted	Convicted	Total
Waived	48 37.21%	81 62.79%	129 100.00%
Invoked	15 46.88%	17 53.13%	32 100.00%
Total	63 39.13%	98 60.87%	161 100.00%

Pearson chi2(1) = 1.0057 Pr = 0.316

Although a suspect's response to *Miranda* is not significantly related to either the prosecutor's charging decision or the likelihood of conviction, it is significantly related to the process by which the suspect's case will be resolved ($p<.024$). For, as Table 6 below indicates, a suspect who waived *Miranda* was twice as likely to have his case resolved through plea bargaining, and this difference is highly signifi-

cant (p<.009). And in my sample more than 98% of the plea bargains resulted in convictions. That a suspect's decision to waive his *Miranda* rights significantly increases the likelihood that his case will be resolved by plea bargaining confirms Neubauer's earlier finding,[183] and may be the most notable effect of a suspect's response to the pre-interrogation *Miranda* warnings. Presumably, the greater evidence accumulated against suspects who elect to speak to their interrogators (and likely provide them with incriminating information) accounts for this statistically significant relationship. However, this relationship could also be an artifact of the selection bias created by *Miranda*: those suspects who waive their constitutional rights and let police interrogate them may be more cooperative individuals and thus may be more predisposed toward less adversarial means of case resolution such as plea bargaining, while those suspects who invoke their *Miranda* rights may be more inclined to press their claims aggressively through the court system.

TABLE 6: THE RELATIONSHIP BETWEEN *MIRANDA* AND PLEA BARGAINING

Suspect's Response to *Miranda* Warnings	Whether Suspect's Case Was Resolved by Plea Bargaining		
	No	Yes	Total
Waived	69 51.49%	65 48.51%	134 100.00%
Invoked	28 75.68%	9 24.32%	37 100.00%
Total	97 56.73%	74 43.27	171 100.00%

Pearson chi2(1) = 6.9076 Pr = 0.009

The final stage of the criminal process in which a suspect's response to the *Miranda* warnings may exert an effect is, of course, sentencing. In particular, one might reasonably expect that suspects who waived their *Miranda* rights during interrogation would be likely to receive more severe sentences than those suspects who had invoked *Miranda*. Although suspects who waive their *Miranda* warnings are more likely to receive punishment than their counterparts who invoke it, the differences in the severity of punishment they receive are not statistically significant, as Table 7 below indicates.

[183] NEUBAUER, *supra* note 72, at 109-10.

TABLE 7: RELATIONSHIP BETWEEN *MIRANDA* AND SENTENCE SEVERITY

Suspect's Response to *Miranda* Warnings	Severity of Suspect's Sentence				
	None	Low	Medium	High	Total
Waived	48	46	15	15	124
	38.71%	37.10%	12.10%	12.10%	100.00%
Invoked	15	9	2	6	32
	46.88%	28.13%	6.25%	18.75%	100.00%
Total	63	55	17	21	156
	40.38%	35.26%	10.90%	13.46%	100.00%

Pearson chi2(3) = 2.6350 Pr = 0.451

Even if we control for conviction, the relationship between a suspect's response to the *Miranda* warnings and the severity of his sentence remains statistically insignificant ($p<.349$).

In sum, although almost one-fourth of the suspects in my sample chose to invoke their *Miranda* rights and either prevent or terminate police questioning, the effects of *Miranda* on the subsequent processing of a suspect's case were limited. Suspects who waived their *Miranda* rights were 4% less likely to have their cases charged by prosecutors and 10% more likely to be convicted than suspects who invoked, but neither of these differences were statistically significant. Nor was there a relationship between a suspect's response to *Miranda* warnings and the severity of punishment. The only statistically significant effect of *Miranda* in the criminal process was that suspects who waived their *Miranda* rights were twice as likely to have their case resolved by plea bargaining than suspects who had invoked their *Miranda* rights ($p<.009$). And in my sample more than 98% of the plea bargains ultimately resulted in guilty verdicts.

C. A QUALITATIVE ANALYSIS

Though it may be more difficult to measure, the qualitative impact of *Miranda* on current police practices appears to be both subtle and profound. In this section, I will argue that police have adapted to the potential threat of *Miranda* by self-consciously structuring the custodial setting and reading of the *Miranda* warnings so as to maximize the likelihood of receiving a waiver of rights. In particular, I will examine how detectives use various psychological strategies to successfully negotiate *Miranda* waivers. Next, I will analyze the impact of *Miranda* on police practices and ideology in the last thirty years. Despite the generally high rate of waiver among suspects, the long-term impact of *Miranda* has been to profoundly alter both the practice and

ideology of contemporary American police interrogation.

1. Negotiating Miranda

As we have seen, more than three-quarters of the suspects in my sample elected to speak to police after being informed of their *Miranda* rights. Although a suspect may very well be acting in his or her rational self-interest when choosing to waive these constitutional rights,[184] liberal critics of *Miranda* have frequently expressed surprise that so many suspects consent to the very questioning process that may incriminate them. Some liberal critics even take this fact as evidence that suspects do not understand the plain meaning of their constitutional rights, as if suspects who choose to speak to police must necessarily suffer from some kind of false consciousness. Other scholars have pointed to the social pressures to speak to police. "A universal rule of polite social discourse is to speak when spoken to," writes Patrick Malone. "Silence conveys arrogance, hostility, rudeness, and, most of all, guilt."[185] In this section, I explore another possibility that so many suspects choose to waive their rights, in part at least, as a response to the strategic manner in which many police officers and detectives deliver the *Miranda* warnings. Rather than simply reifying the *Miranda* waiver as a binary outcome (waived versus invoked), we must understand the reading of *Miranda* as a social process often orchestrated to acquire consent to further questioning.

As we have seen, the Warren Court in *Miranda* displaced the case-by-case approach of the voluntariness test by requiring the reading of standard warnings prior to custodial police questioning.[186] By providing police with a clear rule that allows for mechanical compliance and by providing courts with an objective standard with which to judge the admissibility of confession evidence, the Warren Court effectively formalized American custodial police questioning procedures. As we have also seen, American police have generally complied with the letter of the *Miranda* requirements, typically reading to custodial suspects their *Miranda* rights from standard cards or advisement forms prior to any questioning.[187] Despite this standardization of police interrogation practices, however, the *Miranda* formula did not entirely remove the pre-interrogation discretion of police officers and detectives. Consequently, the *Miranda* waiver is not always automatically ob-

184 I observed some suspects waive their *Miranda* rights and subsequently convince detectives of their innocence during custodial questioning, thus obtaining their release from custody prior to the filing of any charges.

185 Malone, *supra* note 13, at 370.

186 *See supra* pp. 626-33.

187 *See supra* p. 655.

tained but often becomes an act of consent negotiated as police detectives employ subtle psychological strategies to predispose a suspect toward voluntarily waiving his or her *Miranda* warnings.

Of course, there is considerable variation in the way detectives read *Miranda* warnings to their suspects. A detective's delivery of the fourfold warnings may vary by a number of factors, including the skill and motivation of the particular detective, the subjective importance the detective places on receiving a confession, the seriousness of the case, the detective's interest in the case, the detective's caseload pressures, and even the time of day. Some detectives may even try to induce the suspect to invoke his rights by preceding the reading of the *Miranda* admonition with the statement: "You don't really want to talk to us" or by telling the suspect that it is not in his best interests to speak to the police without an attorney. For example, a detective might attempt to induce an invocation because he feels overloaded with other cases that are exerting more compelling demands on his limited time, or because the timing of the interrogation falls near the end of his shift, or because there already exists enough evidence against a suspect to have the case charged, or because he or she simply wishes to avoid the added paperwork necessitated by interrogation and writing up a statement. To be sure, inducing a suspect to invoke one of his *Miranda* rights appears to occur rarely. I only observed this once in my sample of 182 cases, though several of my subjects supplied additional examples in their anecdotes about themselves and other police officers.

More commonly, detectives in my sample delivered the *Miranda* warnings without any build-up and in a seemingly neutral tone, without any apparent strategy, as if they were indifferent to the suspect's response. One might associate this style with the television character Joe Friday in the popular 1960s television show "Dragnet." Following the routine booking questions, the detective read the warnings to the suspect as one might read a warning from a cigarette label. This approach appeared in a minority of the cases I observed. In the majority of cases I observed, however, detectives employed three kinds of subtle psychological strategies—what I will call "conditioning," "de-emphasizing," and "persuasive" strategies—to predispose a suspect to voluntarily waive his or her *Miranda* rights. In the rest of this section I will provide examples of each of these overlapping strategies.

a. Conditioning

The Laconia Police are taught to employ conditioning strategies throughout interrogation, with the goal of structuring the environment so that the suspect is conditioned and positively reinforced to

respond favorably to their questions. Initially, the hope is that the suspect will give an automatic waiver to the *Miranda* admonition. In this strategy, the detective will walk down to the jail to meet the suspect, politely introduce himself to the suspect, sometimes apologize to the suspect for handcuffing him, inquire about the suspect's physical condition, and then walk the suspect out of the jail and to the interrogation room of the Criminal Investigation Division. At this point, the detective provides the suspect with coffee and sometimes a newspaper, politely asking him if there is anything else he needs. Then the detective lets the suspect "stew" for fifteen to twenty minutes, a strategy thought to enhance the suspect's desire to talk to the police. When the detective returns, he makes pleasant small talk with the suspect, perhaps striking up a conversation about sports, the neighborhood in which the suspect lives, or some other point of common interest as he goes through the routine booking questions—full name, address, phone number, occupation, etc.—atop the standard advisement form. These background maneuvers are intended to disarm the suspect, to lower his anxiety levels, to improve his opinion of the detective, and to create a social psychological setting conducive both to a *Miranda* waiver as well as to subsequent admissions. Sometimes the detective may even subtly tease the suspect by prolonging the build-up to questioning so that the suspect eagerly waives the *Miranda* rights in his desire to speak to the police.

The defining feature of the conditioning strategy is that the police structure the environment and the interaction in a way to facilitate a waiver without explicitly stating so. The following excerpts from my fieldnotes are examples of conditioning strategies intended to solicit a *Miranda* waiver.

> *Example #1*: Detective *G* is extremely friendly. He begins each interrogation by shaking the suspect's hand, and then tries to put him or her at ease with his gentle and polite demeanor. He tells his suspects that he is there to talk to them to get their side of the story, asks some background questions, and then says he must first read them the *Miranda* rights before they can speak. This is calculated to get them to waive their rights, he later told me.

> *Example #2*: Detective *H* uses subtle, background psychology to get a waiver on the *Miranda* warnings. For example, he puts the suspect's name on a sheet on the door, which the suspect then looks at before entering the interrogation room, which makes the suspect's interrogation look more serious than it really is. He also lets the suspect sit alone in the room for five to fifteen minutes prior to any questioning, so as to create the impression that it isn't so important to the investigator whether he talks. Detective *H* also moves his head in a slight up-down motion as he is reading the warnings, so as to subtly induce a waiver by subconsciously conveying the message that the suspect should mirror

him and also waive his head up and down in a motion signifying "yes." Detective *H* crosses out the word "and will" in the second *Miranda* warning, pointing out that what the suspect tells him may help him out and thus may or may not be used against him.

Example #3: The suspect obviously wanted to talk right away, but Detective *J* told him that first he had to get some information. Detective *J*, in his remarkably friendly and non-threatening manner, said he had a couple of rules: he said that he could make no promises but that he would take everything that could help the suspect to the District Attorney; but his second rule was that he would take no lies. In turn, he would not lie to the suspect. Then Detective *J* asked the suspect all the factual information at the top of the form. The suspect was anxious to talk, but Detective *J* continued to put him off to get this information, telling him that he couldn't talk to him yet. Detective *J* later told me that he was doing this to raise the suspect's anxiety, to let the steam build up before the *Miranda* rights, so that the suspect would want to waive his *Miranda* rights (without even thinking about it), which is what the suspect did after Detective *J* finished speaking.

b. De-emphasizing *Miranda*'s Potential Significance

Another strategy detectives employ to maximize the likelihood of eliciting a waiver is to de-emphasize the potential importance of the *Miranda* rights. Following the standard booking questions and the detective's rapport-building small talk, the detective may attempt to de-emphasize *Miranda*'s potential significance in one of two ways: either by blending the *Miranda* warnings into the conversation as if to camouflage it, or by explicitly calling attention to the formality of the *Miranda* warnings so as to understate it. In the first approach, detectives try to blend *Miranda* into the ebb and flow of pre-interrogation conversation by not doing or saying anything unusual when reading the warnings so that the suspect pays no special attention to the admonition. Some detectives deliver the *Miranda* warnings in a perfunctory tone of voice and bureaucratic manner implicitly suggesting that the warnings do not merit the suspect's concern. Other detectives read the *Miranda* warnings without pausing or looking up at the suspect, sometimes even a little quickly, before requesting the suspect's signature, all the while implying that the admonition is a formality that necessarily precedes any questioning.

In the second approach, the detectives de-emphasize the potential importance of the *Miranda* warnings by calling attention to their anomalous status, implicitly conveying that the *Miranda* warnings are unimportant or something to be ignored. For example, the detectives may tell the suspect that the *Miranda* warnings are a mere formality that they need to get through prior to questioning. Or the detective may refer to the dissemination of *Miranda* in popular American televi-

sion shows and cinema, perhaps joking that the suspect is already well-aware of his rights and probably can recite them from memory. Whether the detective attempts to blend his delivery of the *Miranda* warnings into routine conversation or whether he attempts to highlight their anomalous status, the point of either approach is to diffuse the potential impact of the warning. The following excerpts from my fieldnotes are examples of de-emphasizing strategies intended to solicit a *Miranda* waiver.

> *Example #1*: Prior to questioning, Detective *O* told the suspect that they were going to ask her a few questions, that they just wanted to get her side of the story. They told her that they were going to read to her from a form, but that it was just a formality. And she waived.
>
> *Example #2*: The detectives began by pointing out that they had to go over some formalities that the suspect already knew about but that they needed to get through it to go on, they read him his rights, and he waived.
>
> *Example #3*: I observed the following reading of the *Miranda* warnings: "In order for me to talk to you specifically about the injury with [victim's name], I need to advise you of your rights. It's a formality. I'm sure you've watched television with the cop shows right and you hear them say their rights and so you can probably recite this better than I can, but it's something I need to do and we can get this out of the way before we talk about what's happened."

As one detective told me:

> *Miranda* is a stumbling block, it is a hurdle, and it is an important one. It is probably one of the most crucial points in the interrogation. I try to de-emphasize it, at least its importance, when I'm doing the interrogation. I don't make it like this is your big decision to control this interview, I try to de-emphasize it to make it seem like more of an obligation: "Before I can answer any of your questions and discuss this case with you, I need your approval that it is OK to talk with me." So, rather than say "Before I can ask you questions," I try to let the person know that during the interrogation we can have some dialogue: "I'll answer your questions when I can but I can't answer all the questions, and I know you have some questions you want to ask me. Before I can really discuss the case with you, I have to read you your rights. You're already aware of your rights, but I'm going to read them to you anyway." And that way you sort of de-emphasize it because certain key phrases in the admonition are potentially real stumbling blocks.

c. Persuasion

In addition to conditioning suspects to respond to their overtures favorably and downplaying the potential significance of *Miranda* warnings, police detectives may also attempt to persuade suspects to waive their *Miranda* rights. The defining feature of persuasion that distinguishes it from conditioning and de-emphasizing strategies is that the

detective explicitly, if subtly, attempts to convince the suspect to waive his rights. Most commonly, detectives tell suspects that there are two sides to every story and that they will only be able to hear the suspect's side of the story if he waives his rights and chooses to speak to them. Detectives may emphasize that they already know the victim's side of the story, implying that the victim's allegations will become the official version of the event unless the suspect speaks. The detective might add that the prosecutor's charging decision will be influenced by what the detective tells the prosecutor, which in turn is based on what the detective knows about the suspect's side of the story.

Another persuasive strategy detectives employ is to tell the suspect that the purpose of interrogation is to inform the suspect of the existing evidence against him and what is going to happen to him, but that the detective can only do so if the suspect waives his rights. Detectives may also simply emphasize that they wish or need to speak to the suspect. And sometimes detectives modify the phrasing of "Having these rights in mind, do you wish to speak to me?" to "Having these rights in mind, do you want to hear what I have to say?" or "Having these rights in mind, do you want to tell me your side of the story?" The following excerpts from my fieldnotes are examples of persuasive strategies intended to elicit a *Miranda* waiver.

> *Example #1*: Detective *T* is skilled at telling the suspect that he wants to hear their side of the story but can only do so if they waive their rights. He then reads it to them while showing them the words on the form, and concludes by saying: "Having these rights in mind, do you wish to hear what I have to say?"—notice, not "do you wish to speak to me?" He builds up to this by telling the suspect that his purpose is to explain what's going on, what the suspect will be charged with, and that this is the suspect's only chance to speak to him.
>
> *Example #2*: Detective *X* began by telling the suspect that he was here to hear her side of the story, to tell her what's going on, and why she was here. After reading the admonition and after she said she understood her rights, he said: "Having these rights in mind, do you want me to tell you what's going on?"
>
> *Example #3*: Prior to reading the *Miranda* warnings the detective stated: "The reason I'm talking to you tonight is that an officer was involved in a stabbing. Some people have identified you as the person who stabbed Officer *X*. This is your opportunity to tell me your side of the story. I'm going to be straightforward: I know that you did it. What I need to know from you is why you did it." The detective then read the suspect his *Miranda* rights.
>
> *Example #4*: The detective began by telling the suspect that he just wanted the suspect's side of the story. "You're implicated," he said, "whether or not you're actually guilty." Then he confronted the suspect with the evidence against him. "Everyone says you did it. Everyone is

pointing to you. You are a suspect, and that is why we have placed you under arrest for the murder of [victim's name]. If you did it accidentally, if you did it in self-defense, if someone else was in the room, we need to know, because all the evidence points to that happening. We need to get your side of the story, but first we have to advise you of your rights." The detective then read the suspect his *Miranda* rights.

As one detective told me:

> Before you ever get in there, the first thing an investigator usually thinks about is how I can get around, how can I breeze through this *Miranda* thing so I don't set the guy off and tell him not to talk to me. How can we get around *Miranda*, what is the best way, the quickest way to get through this thing, song and dance it, sugarcoat it, or whatever. What is the best way we can get around it so we can get on with the interview and that's the first thing I'm thinking about because you know you basically have to do this first because if he shuts off right at the point you give *Miranda*, you've just closed down your investigation. So you've got to waltz around *Miranda*.

The detective continued:

> I've seen hundreds of different officers do it different ways. Everybody has their own approach. No successful guy walks in and sits down and says "alright pal, you have the right to remain silent, anything you say can and will be used against you," blah, blah, blah. That is not the way you get around *Miranda* because the first thing the guy thinks of is "hey, I've seen this on television a hundred times, I'm not going to talk to the cops." It just doesn't happen that way. So you come in and you and the guy have your cup of coffee and say "look we want to hear your side of the story, blah, blah, blah, how's it going?" Then you say a little technical thing I have to cover, you sugarcoat it the best you can. You do read it verbatim off the form, because you are required to do that but you do everything you can to soften the impact of it.

In sum, today's detectives have adapted to the requirements of *Miranda*, in part, by fashioning strategies—such as the use of conditioning, de-emphasizing, and persuasion—to predispose suspects to voluntarily waive their rights, thus minimizing the potential obstacle that *Miranda* presents to their custodial questioning practices. The *Miranda* waiver must therefore be understood not simply as a dichotomous event, but rather as a process orchestrated and negotiated by detectives. Although they vary by the motivation level and skill of the detective, as well as by the perceived seriousness of the case under investigation, the use of negotiating strategies may go a long way toward explaining why and how detectives remain so generally successful at eliciting waivers to *Miranda* from their custodial suspects. These negotiating strategies usually remain within the letter of *Miranda*, but frequently they straddle the ambiguous margins of legality.

2. *Analyzing the Long-Term Impact of* Miranda

Miranda has been both the most celebrated and the most reviled Supreme Court case in the history of American criminal justice. Although no one has systematically analyzed the long-term effects of *Miranda* on police behavior, court cases, or popular consciousness, the issue of *Miranda*'s impact remains a source of controversy among scholars and policy-makers. Led by then-Attorney General Edward Meese, some conservatives sought to overturn *Miranda* in the mid-1980s, arguing that it was an illegitimate act of judicial policy-making and renewing the charge that it has caused significant damage to law enforcement.[188] Liberal critics countered by pointing to the lack of evidence that *Miranda* has adversely affected law enforcement, arguing instead that *Miranda*'s effects have been more symbolic than real.[189] Notwithstanding the ongoing debate between conservative and liberal critics of *Miranda*, the law enforcement community has successfully adapted itself to *Miranda*'s requirement of pre-interrogation constitutional warnings in the last three decades. Significantly, neither the International Association of Chiefs of Police nor the National District Attorneys Association (nor, for that matter, any major police and prosecutor lobbying groups) have joined in Meese's call to overturn *Miranda*.[190] Rather, many police chiefs hail the virtues of *Miranda* and no longer question its legitimacy.[191] Today's police officers and detectives—virtually all of whom have known no law other than *Miranda*—have also accepted *Miranda*'s legitimacy and recognized its value as a symbol of police professionalism. Even the conservative Rehnquist Court has repeatedly reaffirmed in dicta its commitment to maintaining the *Miranda* doctrine.[192]

Nevertheless, the Supreme Court has, with few exceptions, progressively narrowed the scope and application of the *Miranda* doctrine in the last thirty years, leading critics to charge that the Burger and Rehnquist Courts have steadily eroded the core of *Miranda*. Notably,

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188 *See generally* REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION, *supra* note 17. *See also* Stephen Markman *The Fifth Amendment and Custodial Questioning: A Response to 'Reconsidering* Miranda,' 54 U. CHI. L. REV. 938 (1987); Grano, *This Law Must Go, supra* note 20; Joseph Grano, Miranda v. Arizona *and the Legal Mind: Formalism's Triumph over Substance and Reason*, 24 AM. CRIM. L. REV. 243 (1986).

189 *See* Schulhofer, *supra* note 70, at 460-61; Yale Kamisar, Meese vs. Miranda*: The Attorney General Has No Case*, DETROIT FREE PRESS, Feb. 20, 1987, at 9A; Welsh White, *Defending* Miranda: *A Reply to Professor Caplan*, 39 VAND. L. REV. 1 (1986).

190 Malone, *supra* note 13, at 368.

191 *See* Tamar Jacoby, *Fighting Crime by the Rules*, NEWSWEEK, July 1988, at 53; Eduardo Paz-Martinez, *Police Chiefs Defend Miranda Decision Against Meese Threats*, B. GLOBE, Feb. 5, 1987, at 25.

192 *See, e.g.*, Moran v. Burbine, 475 U.S. 412 (1986).

in *Harris v. New York*,[193] the Court ruled that although a voluntary statement obtained in violation of *Miranda* could not be admitted into evidence as part of the prosecution's case-in-chief, it could nevertheless be used for impeachment purposes on cross-examination if the defendant chose to take the stand. In *Michigan v. Tucker*,[194] the Supreme Court ruled that the *Miranda* warnings are of less than constitutional stature: a violation of *Miranda*, the Court reasoned, does not violate the Fifth Amendment but only violates a set of prophylactic rules or procedural safeguards designed to protect the suspect's underlying right against compulsory self-incrimination. In *Michigan v. Mosley*,[195] the Court ruled that the resumption of an interrogation two hours after the suspect has elected to remain silent does not violate *Miranda* if the suspect subsequently chose to waive his *Miranda* rights.[196] In perhaps the most significant departure from *Miranda*, the Supreme Court held in *New York v. Quarles* that police officers may be excepted from the requirement of pre-interrogation *Miranda* warnings in emergency situations when public safety is at issue, though the Court did not define the scope of this exception to *Miranda*.[197] Two years later in *Moran v. Burbine* the Court held that neither the failure to inform a suspect that his lawyer had been attempting to contact him nor misleading the lawyer about the interrogation of his client affected the validity of the suspect's waiver.[198] In *Arizona v. Fulminante*, the Court surprised both conservative and liberal critics alike by ruling that coerced confessions may be harmless error, reversing a well-established doctrine making coerced confessions automatic grounds for a retrial.[199] Most recently, the Supreme Court held in *Davis v. United States* that police are not obligated to cease their questioning of a suspect who makes an ambiguous request to have a lawyer present.[200] In short, the Supreme Court has chipped away at *Miranda* in the last thirty years.[201] As Patrick Malone has noted:[202]

> With one or two exceptions, the Court has voted to make it easy for police to show a valid waiver of rights, and at the same time it has taken a

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193 Harris v. New York, 401 U.S. 222 (1971).

194 Michigan v. Tucker, 417 U.S. 433 (1974).

195 Michigan v. Mosley, 423 U.S. 96 (1975).

196 Ironically, several years later in Edwards v. Arizona, 451 U.S. 477 (1981), the Court held that if a suspect invokes his right to counsel (as opposed to his right to silence), police officers cannot resume questioning at a later time.

197 New York v. Quarles, 467 U.S. 649 (1984).

198 Moran v. Burbine, 475 U.S. 412 (1986).

199 Arizona v. Fulminante, 499 U.S. 279 (1991).

200 Davis v. United States, 114 S. Ct. 2350 (1994).

201 For an extended discussion of *Miranda*'s progeny, see LAFAVE & ISRAEL, *supra* note 44.

202 Malone, *supra* note 13, at 378.

forgiving approach to police failures to give *Miranda* warnings. Moreover, when it has been concluded that a suspect waived his rights voluntarily, courts have often leaned on this finding to conclude that the entire subsequent interrogation was properly conducted, even though that is supposed to remain a separate inquiry.

That the Supreme Court has progressively weakened the spirit of *Miranda* in the last thirty years and that detectives employ clever strategies with which to negotiate *Miranda* warnings and obtain waivers in a high percentage of cases may suggest that *Miranda* has become little more than an empty formality in the early stages of the criminal process. Such a view, however, is misguided. Whatever its symbolic value, *Miranda* has had practical consequences for police, suspects, and society—even if these consequences are not easily reducible to quantifiable measures. In the remainder of this section, I will argue that *Miranda* has had a profound impact in at least four different ways: first, *Miranda* has exercised a civilizing influence on police interrogation behavior, and in so doing has professionalized police practices; second, *Miranda* has transformed the culture and discourse of police detecting; third, *Miranda* has increased popular awareness of constitutional rights, and; fourth, *Miranda* has inspired police to develop more specialized, more sophisticated and seemingly more effective interrogation techniques with which to elicit inculpatory statements.

First, *Miranda* has exercised a civilizing influence on police behavior inside the interrogation room. Although physically coercive interrogation tactics had been steadily declining since the aftermath of the Wickersham Report[203] and U.S. Supreme Court cases in the 1930s and 1940s,[204] abusive police methods had not altogether disappeared by the 1950s and 1960s.[205] Of course the pace of change across the country had been uneven: while the third degree appeared to be infrequent in America during the second third of the twentieth century, it still occurred with troubling regularity in some parts of the country and in some police departments. In the early 1950s William Westley found that although most officers did not employ coercive or abusive methods in a small police department in Indiana, a minority of officers still continued to use physical force in some interrogations.[206]

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203 *See* 11 National Commission on Law Observance and Law Enforcement, *Report on Lawlessness in Law Enforcement* (1931) (also known as "The Wickersham Report").

204 *See supra* notes 26-39 and accompanying text.

205 Miranda v. Arizona, 384 U.S. 436, 445-47 (1966).

206 *See* William Westley, *Violence and the Police*, 59 AM. J. SOC. 34, 36-37 (1953). Although the police chief had publicly denounced its use, the third degree was legitimated by a subcultural norm when police felt their authority was under challenge; when they felt certain of a suspect's guilt; when the suspect was a repeat offender from a lower status, class or racial group; and in egregious cases, such as child molestation. *See* WILLIAM A. WESTLEY, VIOLENCE AND THE POLICE: A SOCIOLOGICAL STUDY OF LAW, CUSTOM, AND MORALITY (1970).

Observers for the American Bar Foundation Study who witnessed interrogations in police departments in Michigan, Wisconsin, and Kansas in 1956 and 1957, however, found that the use of coercion during custodial questioning (whether physical or psychological) was exceptional.[207] Yet the 1961 Commission on Civil Rights reported that strong-arm interrogation methods still existed, especially in the South, even if they were no longer generally common.[208] Wald et al.'s study of the New Haven Police revealed that interrogation practices changed significantly in a five year interval during the early 1960s: by 1966 the New Haven Police engaged in considerably less hostile interrogation, though they employed psychologically coercive methods in a minority of cases.[209] Although by the mid-1960s American "police were more restrained and law-abiding than ever," as *Miranda* critic Gerald Caplan has correctly pointed out,[210] *Miranda* nevertheless effectively eradicated the last vestiges of third degree police interrogation practices in America. The Warren Court in *Miranda* sent an unmistakable message—to police, to prosecutors, and to trial courts—that strong arm tactics would no longer be tolerated. In the three decades since *Miranda* became law, American police interrogation methods have become entirely psychological in nature. To be sure, coercive practices sometimes still occur, but they appear to be exceptional.[211] Not surprisingly, however, only rarely are confessions found to be involuntary or suppressed from evidence in trial proceedings due to police improprieties.[212]

Miranda has increased the level of professionalism among police officers and detectives. By laying down a formal rule that establishes

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207 American Bar Foundation Study Documents, University of Wisconsin, Madison, Criminal Justice Library.

208 *Miranda*, 384 U.S. at 446.

209 *See* Wald, *supra* note 72, at 1574, 1558-62.

210 *See* Caplan, *supra* note 11, at 1444.

211 *See, e.g, Confession at Gunpoint?* (ABC television broadcast, Mar. 23, 1991); Amnesty Int'l, United States of America: ALLEGATIONS OF POLICE TORTURE IN CHICAGO, ILLINOIS, (December 1990).

212 In a study of criminal courts in nine medium-sized counties (ranging 100,000 to 1 million) in Illinois, Michigan, and Pennsylvania, Nardulli found that only five of 7,035 cases (.07%) resulted in lost convictions as a result of judges suppressing confessions. Peter Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, AM. B. FOUND. RES. J. 585, 601 (1983). In a subsequent study of 2,759 cases in the city of Chicago, Nardulli reported that judges suppressed confessions in .04% of all cases. Peter Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, 1987 U. ILL. L. REV. 223. Guy and Huckabee found that only 12 of 2,354 cases (.51%) appealed to either the Indiana Supreme Court or the Indiana Court of Appeals from the 1980 to 1986 resulted in exclusion of evidence as a result of *Miranda* violations. See Karen L. Guy & Robert G. Huckabee, *Going Free on a Technicality: Another Look at the Effect of the* Miranda *Decision on the Criminal Justice Process*, 4 CRIM. JUST. RES. BULL. 1 (1988).

regular procedures for interrogations, *Miranda* has created objective and written standards of accountability for custodial police behavior. Informally, *Miranda* has established the norm that patrolmen and detectives can no longer compel suspects to cooperate with them during custodial questioning. By setting limits on the manner in which they are permitted to question suspects, *Miranda* has fundamentally altered police perceptions of their proper relationship to custodial suspects inside the interrogation room. Although they may have devised clever strategies for successfully negotiating *Miranda* waivers and thereafter eliciting statements, American police in the last thirty years have, by necessity, become more solicitous of suspects' rights, more respectful of their dignity, and more concerned with their welfare inside the interrogation room. *Miranda* has also contributed to police professionalism by increasing the required level of training and education patrolmen and detectives receive in the law of evidence and criminal procedure, first in the academy and later in advanced and specialized courses on investigatory techniques.[213] *Miranda* has increased police professionalism by rendering interrogation practices more visible to and thus more subject to supervision and control by other actors within the criminal justice system—especially police managers, prosecutors, and judges. In short, in the last thirty years *Miranda* has exerted a civilizing effect on police behavior and in so doing has professionalized the interrogation process in America.

Second, the *Miranda* decision has transformed the culture—the shared norms, values, and attitudes—of police detecting in America by fundamentally reframing how police talk about and think about the process of custodial interrogation. In the last three decades, the language of *Miranda* has structured virtually every evaluation of interrogation practices in police work—whether these discussions occur in the academy, police stations, investigative training courses, court appearances, suppression hearings, or trials. Consequently, *Miranda* is at the forefront of every interrogator's consciousness, and over the years it has changed the sensibilities of police officers and detectives. "*Miranda* is the Bible as far as we're concerned," one detective in-

[213] In the academy, police recruits receive extensive training in the law of evidence and criminal procedure. Once a patrol officer advances to the rank of detective, he or she receives further specialized training in interrogation techniques. Additionally, in-house training on interviewing and interrogation may be supplemented by seminars and week-long advanced training courses taught by private firms, as well as state and federal police agencies. Investigators in the large, urban department in which I conducted my fieldwork also receive quarterly booklets from the local prosecutor's office, keeping them abreast of recent developments in state and federal case law. Unlike their predecessors of earlier generations, today's investigating detectives have thus become uniformly well-versed in the constitutional law of criminal procedure.

formed me. Another detective said:

> Although there have been dozens, maybe hundreds, of cases refining polishing, and adding to *Miranda*, *Miranda* is the number one case you focus on. And you think: "Am I getting this confession legally?" And what will the courts be focussing on? I heard stories that before *Miranda* you could just go in there and you just sweat the guy until he says what you want him to say, just like in the movies. The movies didn't make up these techniques, but I have never seen anything but Miranda in my 27 years here. So I had no idea what it was like before *Miranda*.

In the world of modern policing, *Miranda* constitutes the moral and legal standard by which interrogators are judged and evaluated. Yet police officers and detectives no longer view the *Miranda* requirements as handcuffing their investigative abilities, but have come to accept *Miranda* as a legitimate and routine part of the criminal process, simply another aspect of the rules of the game. Indeed, virtually all police officers and detectives today have known no law other than *Miranda*. By redefining the moral and legal discourse of police interrogation in the last three decades, *Miranda* has forever changed how police in America think about, discuss, and understand the legal and moral meaning of custodial interrogation. In short, *Miranda* has changed police sensibilities. As a police manager and a former homicide detective, told me:

> *Miranda* has been so institutionalized now that it really isn't an impediment to law enforcement. The officers understand it, they don't try to get around it, they don't try to play with it. And what they're basically doing is working with it. . . . Instead of being an impediment, *Miranda* has probably made us do our job better. It gives a better appearance. It gives us a more professional appearance to the prosecutorial staff and the defense bar, and most importantly—and I can't emphasize how importantly—it gives us a professional appearance in the eyes of a jury, the trier of facts. And those are the people who we are trying to impress. They are the ones who must make a decision between guilt and innocence.

Third, along with other Warren Court decisions, *Miranda* has increased public awareness of constitutional rights. The *Miranda* warnings may be the most famous words ever written by the United States Supreme Court. With the widespread dissemination of *Miranda* warnings in innumerable television shows as well as in the movies and contemporary fiction, the reading of the *Miranda* rights has become a familiar sight and sound to most Americans; *Miranda* has become a household word. As Samuel Walker writes, "[e]very junior high school student knows that suspects are entitled to their '*Miranda* rights.' They often have the details wrong, but the principle that there are limits on police officer behavior, and penalties for breaking

those rules, is firmly established."[214] As we have seen, a national poll in 1984 revealed that 93% of those surveyed knew that they had a right to an attorney if arrested,[215] and a national poll in 1991 found that 80% of those surveyed knew that they had a right to remain silent if arrested.[216] Perhaps it should not be surprising that, as many of my research subjects told me, some suspects assert their rights prior to the *Miranda* admonition or in situations where police warnings are not legally required. Indeed, in the last thirty years, the *Miranda* rights have been so entrenched in American popular folklore as to become an indelible part of our collective heritage and consciousness.

Fourth, *Miranda* has inspired police to develop more specialized, more sophisticated, and seemingly more effective interrogation techniques with which to elicit inculpatory statements from custodial suspects. The law enforcement community reacted to *Miranda* with bitter indignation, fearing that the Warren Court might issue even more expansive rulings (such as mandating attorneys in the stationhouse) that would effectively put an end to police interrogation. After all, the Warren Court devoted more than six pages of the *Miranda* opinion to excoriating the interrogation methods advocated by the leading police training manuals of the time.[217] Yet although it sharply condemned "menacing police interrogation procedures,"[218] the Warren Court did not specifically prohibit any tactic advocated in these manuals.

In response to the potential threat *Miranda* posed to interrogation practices, police have fashioned increasingly subtle and sophisticated interrogation techniques—such as the Behavioral Analysis Interview and the Nine-Step method Fred Inbau and his co-authors introduced in the most recent edition of their well-known interrogation training manual[219]—and seek to manipulate suspects into confessing without the appearance of manipulation.[220] The Behavioral Analysis Interview consists of a structured set of non-investigative hypothetical questions that are thought to evoke particular behavioral responses from which interrogators are taught to ascertain the truthfulness of suspects' responses and infer deception prior to commencing formal interrogation.[221] Inbau et al. recommend approximately fifteen questions to pose to the suspect, ranging from general ques-

214 *See* WALKER, *supra* note 169, at 52.
215 *See* Toobin, *supra* note 168, at 11.
216 *See* WALKER, *supra* note 169, at 51.
217 *See* Miranda v. Arizona, 384 U.S. 436, 448-55 (1966).
218 *See id* at 457.
219 *See* INBAU ET AL., *supra* note 55.
220 *See* Leo, *Police Interrogation and Social Control*, *supra* note 147, at 98.
221 *See* INBAU ET AL., *supra* note 55, at 63-68.

tions (such as why does the suspect think someone would have committed the crime) to specific ones (such as would the suspect be willing to take a polygraph). Inbau et al. argue that guilty suspects react defensively and with discomfort to these questions; they equivocate, stall, and provide evasive or noncommittal answers. By contrast, innocent suspects are thought to produce cooperative, direct, and spontaneous responses to these questions.[222] In their introductory and advanced training seminars, the Chicago-based firm Reid & Associates advise interrogators to treat as guilty any suspect whose answers to four or more of the fifteen questions appear deceptive to the interrogator.[223]

The Nine-Step Method was introduced by Inbau et al. as a way of consolidating and reorganizing earlier police training techniques into a sequential logic of psychological persuasion and manipulation designed to elicit a confession by systematically (if gradually) overcoming the resistance of reluctant suspects.[224] According to the Nine-Step method, the interrogator begins by confronting the suspect with the reality of his guilt by accusing him of the crime (Step 1).[225] The purpose here is to set the tone of the interrogation, as well as to inform and to disarm the suspect.[226] The interrogator then develops psychological "themes" that morally excuse or justify the suspect's behavior (Step 2).[227] This is the most important stage of the interrogation process.[228] Inbau et al. recommend different themes for "emotional" and "non-emotional" offenders, and many of the techniques discussed in earlier editions are incorporated into these theme developments.[229] In the next step, the interrogator is instructed to weaken and suppress the suspect's denials, with the goal of shutting down the process of denial altogether (Step 3).[230] In Step 4, the interrogator overcomes (and reverses the meaning of) the suspect's emotional, factual, or moral objections to the interrogator's assertions.[231] Next, the interrogator is instructed to retain (largely through physical gestures) the attention of the suspect, who by now should be withdrawn and confused (Step 5).[232] The interrogator handles the

222 *Id.*
223 *See* Leo, *supra* note 22, at 107-10.
224 *Id.* at 67-127.
225 INBAU ET AL., *supra* note 55, at 79.
226 *Id.*
227 *Id.*
228 *See* Leo, *Police Interrogation and Social Control*, *supra* note 147, at 108-10.
229 INBAU ET AL., *supra* note 55, at 93-141.
230 *Id.* at 80.
231 *Id.*
232 *Id.*

suspect's passive and downcast mood by shortening and embellishing the psychological themes presented in Step 2, concentrating on the development of one compelling moral theme in particular (Step 6).[233] In Step 7, the suspect is presented an alternative question consisting of two choices (one good, one bad) that account for commission of the activity.[234] The suspect is encouraged to choose the positive alternative, which is a natural extension of the theme developed in Step 2 and refined in Step 6.[235] The interrogator then enjoins the suspect to orally reveal the details of the offenses (Step 8).[236] Finally, the suspect's oral statements are converted into a written confession of guilt (Step 9).[237]

These techniques are more subtle than earlier approaches because they are designed (however plausibly) to teach interrogators to see through their subjects, to uncover their suspects' conscious and unconscious deceits, and ultimately to read their minds. The Behavioral Analysis Interview has turned the interrogator into a human polygraph, cloaking his subjective hunches about deception in the mantle of scientific legitimacy, while the Nine-Step method has trained interrogators to employ influence, manipulation, and persuasion to systematically break down the resistance of custodial suspects and induce confession. Mired in the rhetoric of science, these techniques are more psychologically sophisticated than earlier methods. Although the Warren Court may have placed greater restraints on their behavior during custodial questioning, police have met the challenges of *Miranda* by devising increasingly clever and ingenious interrogation strategies with which to persuade suspects to confess.[238]

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233 *Id.*

234 *Id.*

235 *Id.* at 167-70.

236 *Id.* at 80.

237 *Id.* at 81.

238 Moreover, as I have argued elsewhere:

> Despite the rights they announce and the knowledge they convey to criminal suspects, *Miranda* warnings may, in part, actually aid detectives in obtaining confessions . . . . *Miranda* warnings co-opt and integrate the suspect into the questioning process by fostering the illusion that the suspect and the investigator share a commonality of interest, thus creating the appearance of a relationship that is more symbiotic than adversarial. After receiving the apparently disarming set of warnings, silence is, indeed, more likely to be interpreted as a sign of guilt . . . . Moreover, the fourfold *Miranda* warnings that routinely precede every interrogation have become something of a well-recognized ritual. Like other rituals, *Miranda* warnings may function to maintain confidence in our social and political relationships . . . . [R]ituals affirm the hierarchy of roles and relationships within our social institutions; they are, essentially, conventions through which we show respect to others, typically our social superiors. By creating a felt sense of obligation among suspects to show respect to the police who question them, the ritualistic *Miranda* warnings thus provide suspects with an opportunity to legitimize their own status during the questioning process.

See Leo, *Police Interrogation and Social Control*, *supra* note 147, at 116-17.

V. RIGHTS TALK: ABOLISHING *MIRANDA*?

As we have seen, *Miranda* remains controversial among policymakers and academics who continue to debate its legitimacy and desirability almost thirty years after its judicial creation.[239] I have argued above that the historical impact of *Miranda* on law enforcement has been largely to reframe how police talk and think about the process of custodial questioning and in so doing to professionalize interrogation practices and contribute to the declining use of coercion. I have further argued that although the requirement of warnings undoubtedly causes some suspects to avoid cooperating with their interrogators, police have successfully adapted their practices to the legal requirements of *Miranda* by using conditioning, deemphasizing, and persuasive strategies to orchestrate consent to custodial questioning in most cases. In addition, in response to *Miranda,* police have developed increasingly specialized, sophisticated, and effective interrogation techniques with which to elicit statements from suspects during interrogation. Nevertheless, critics of *Miranda* continue to argue for its abolition on both principled and pragmatic grounds. While an extended discussion of the policy objectives of *Miranda* is beyond the scope of this Article, in this section I will briefly evaluate the desirability of *Miranda* as public policy.

Critics have argued that *Miranda* should be abolished because it threatens to destroy our system of separate federal and state courts.[240] This argument runs as follows: federal courts only have legitimate supervisory authority over state courts in constitutional matters; the Burger Court ruled in *Michigan v. Tucker*[241] that the *Miranda* warnings are not of constitutional stature themselves, but rather are merely prophylactic measures designed to protect underlying constitutional rights;[242] therefore, the Supreme Court's attempt to impose *Miranda* on state courts represents an illegitimate extension of federal power. This argument should be immediately dismissed as irrelevant to any meaningful policy discussion of the desirability of *Miranda* as law. That the Burger Court in *Tucker* declared *Miranda* warnings to be procedural safeguards rather than underlying constitutional rights may be one of many contradictions in the Supreme Court's constitutional jurisprudence. Since this argument is based on a sociologically trivial semiotic distinction—the *Miranda* warnings are widely understood as constitutional rights by the American public, by legal actors, and even

239 *See supra* notes 11-20 and accompanying text.

240 *See* GRANO, *supra* note 19, at 199-222.

241 417 U.S. 433 (1974).

242 *Id.* at 446.

by appellate courts themselves—it does not speak to the social desirability of *Miranda* warnings, and it would be an incomprehensible basis for overturning one of the most well-known cases in American history.

A more plausible argument for overruling *Miranda* is that it has exercised substantial harm to law enforcement efforts at controlling crime.[243] This argument relies on the data gathered more than a quarter of a century ago and analyzed in the impact studies published in the late 1960s and early 1970s. As we have also seen, these methodologically weak and now outdated studies do not support the assertion that *Miranda* has had an adverse impact on confession and conviction rates, and because these impact studies were undertaken so long ago, they tell us nothing about the current effects of *Miranda* on police investigative practices. If critics of *Miranda* wish to understand the impact of *Miranda* on today's confession and conviction rates, then more empirical and quantitative research will be necessary.[244] In this study,

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[243] *See* REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRETRIAL INTERROGATION, *supra* note 17, at 443. More recently, Paul Cassell has also argued that "*Miranda* has significantly harmed law enforcement efforts in this country." *See* Cassell, *supra* note 19, at 390. Reviewing the *Miranda* impact literature, *see supra* part III, Paul Cassell argues that *Miranda* is responsible for a 16% mean reduction in the confession rate and that confessions are necessary to solve 24% of the cases involving confessions. *Id.* at 394-417, 422-33. Multiplying these two figures (.16 x .24 = 3.8%), Cassell argues *Miranda* is responsible for the loss of 3.8% of all cases in which criminal suspects are questioned. *Id.* at 437-38. For a critique of Cassell's analysis and calculations, see Schulhofer, *supra* note 132. Reviewing the same *Miranda* impact literature, Schulhofer counter-argues that *Miranda* is only responsible for a 4.1% reduction in the confession rate and that confessions are necessary to solve 19% of all cases involving confessions. *Id.* at 516-39. Multiplying these two figures (.041 x .19 = 0.78%), Schulhofer argues that *Miranda* is responsible at most for the loss of 78 hundredths of 1% of all cases in which criminal suspects are questioned. *Id.* at 539-44. Schulhofer further argues, however, that this figure "substantially overstates" *Miranda*'s current due to several sources of overestimation in the adjusted 0.78% attrition rate (organizational failure and general chaos in the criminal justice system; the incomparability of *Miranda* warnings in a pre-*Miranda* regime prior to 1966 and a non-*Miranda* regime today; the effect of sentence enhancements in real-offense sentencing; and the fact that police have readily adapted to *Miranda*'s requirements in the almost thirty years since the *Miranda* impact studies were undertaken). *Id.* at 544-47. As a result, Schulhofer concludes that "[f]or all practical purposes, *Miranda*'s empirically detectable net damage to law enforcement is zero." *Id.* at 547. My own view is that the outdated studies on which both Cassell and Schulhofer rely are so crudely designed, so ineptly executed, and so thoroughly riddled with the most elementary methodological defects that they do not permit anything but the most speculative guesses at *Miranda*'s quantitative impact on actual lost convictions, no matter how thoroughly or meticulously one canvasses the severely flawed and incomplete data they offer.

[244] We can never know the number or percentage of suspects who waive one or more of their *Miranda* rights who in the absence of *Miranda* warnings would have provided police with admission or confession statements. We can compare the conviction rates of suspects who waived and suspects who invoked their *Miranda* rights, and using chi square and/or regression analysis we can compare the differences in conviction rates to see if they are statistically significant (i.e., not likely due to chance). In this way, we can measure whether *Miranda* warnings are exercising a substantial or adverse effect on law enforcement. *See*

however, I did not find a statistically significant relationship between a suspect's response to *Miranda* warnings and his likelihood of being convicted.[245] This study, however, does not support the assertion that *Miranda* has exercised an adverse effect on law enforcement.[246]

Nevertheless, there are social costs associated with *Miranda*.[247] First, *Miranda* does increase the likelihood that potentially guilty custodial suspects will choose not to cooperate with police. Almost a quarter of the suspects in my sample invoked their right to terminate interrogation, though of course we do not know how many of those suspects were guilty or would have provided admissions or confessions to police in the absence of pre-interrogation warnings. Second, even if a suspect confesses to police, an improper *Miranda* warning may lead to its exclusion from evidence in court. This happened in only one (less than 1%) of the cases in my study;[248] more generally, confessions are very rarely excluded from evidence in court as a result of *Miranda* (or any other legal) improprieties.[249] Yet as Bradley reminds us:

> It is important to consider not just percentages but absolute numbers. In the United States in 1988 there were about two million arrests for "Index" crimes and another million for drug and weapons violations. If 5 percent of these cases were dismissed due to search problems, and another 5 percent due to *Miranda* problems, then 30,000 cases were dismissed nationwide in one year because of the exclusionary rule.[250]

Third, although it does not adversely affect law enforcement, *Miranda* does appear to result in marginally lower conviction rates. In my study, suspects who waived their *Miranda* rights were almost 10% more likely to be convicted than their counterparts who did not. Of course, this difference may be partially accounted for by selection biases and other case-specific factors.[251] Fourth, as we have seen, *Miranda* appears to have an effect on the collateral functions of interrogation: invocations will result in lower rates of identifying accomplices, clear-

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Leo, *supra* note 21. *See also* George C. Thomas III, *Is Miranda A Real-World Failure? A Plea For More (And Better) Empirical Evidence*, 43 UCLA L. REV. 821 (1996).

245 *See supra* pp. 657-60.

246 *See id.*

247 *See generally* Cassell, *supra* note 19.

248 *See* Leo, *supra* note 22, at 271-75.

249 *See* Nardulli, *supra* note 212, at 596-99; *see also* AMERICAN BAR ASS'N, CRIMINAL JUSTICE IN CRISIS 27-34 (1988).

250 CRAIG BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION 43 (1993) (citations omitted). Based on his analysis of *Miranda*'s effect on lost convictions, see *supra* note 243, Paul Cassell argues that "[r]oughly 28,000 arrests for serious crimes of violence and 79,000 arrests for property crimes slip through the criminal justice system due to *Miranda*, and almost the same number of cases are disposed of on terms more favorable for defendants." Cassell, *supra* note 19, at 484.

251 *See* Leo, *supra* note 22, at 281-82.

ing crimes, and recovering stolen property.[252] Fifth, as Inbau and Manak note, *Miranda* and its progeny have engendered additional pre-trial litigation that consumes judicial time and effort.[253]

Finally, the most consequential effect of *Miranda* may be that it has created a set of rules that elevate concerns for formal justice over concerns for substantive justice, which may lead to outcomes that are in tension with our substantive ideals and thus cause cynicism among legal actors and the public.[254] That a confession to a crime such as rape or murder may be thrown out and a seemingly guilty suspect set free because the police did not properly recite the words on their *Miranda* cards fundamentally violates our sense of justice. Such outcomes—even if they occur infrequently—threaten to undermine the legitimacy of the criminal justice system by causing the public to view the legal process as committed to a game of strategic opportunity and tactical maneuvering rather than the pursuit of justice. It is no coincidence that *Miranda* violations are widely regarded among the public as "technicalities." Moreover, this argument cuts both ways. Our concern with proper procedures may also undermine our commitment to fair police methods. As Patrick Malone has pointed out:

> While *Miranda* has done little to change the dynamics of the interrogation process or the techniques used by police, it has affected the ex post facto analysis by courts about whether a particular confession should be admitted into evidence. *Miranda* has shifted the legal inquiry from whether the confession was voluntarily given to whether the *Miranda* rights were voluntarily waived.[255]

By elevating the form of legal process over the substance of legal outcomes, appellate courts have frequently lost sight of the underlying rationale of *Miranda*—the prevention of compelled self-incriminating testimony.[256]

Just as *Miranda* imposes costs on society, so too does it offer social benefits. First, as we have seen, *Miranda* has led police to interrogate suspects with more civility and restraint than in earlier times, thus contributing to the increasing professionalization of the American police in the last three decades. *Miranda* warnings provide guidelines to police and circumscribe their interrogatory discretion. As a result of *Miranda*, suspects are treated with greater dignity and permitted greater autonomy prior to and during custodial questioning. Second, *Miranda* conveys to suspects the fairness of police procedures, thus in-

252 *See supra* p. 644 and accompanying notes.
253 *See* Inbau & Manak, *supra* note 18, at 189.
254 *See* GRANO, *supra* note 19, at 206-16.
255 *See* Malone, *supra* note 13, at 377.
256 *See* GRANO, *supra* note 19, at 206-16.

creasing the legitimacy of the institution of American policing. Sociolegal research has repeatedly demonstrated that participants in the legal process evaluate the legitimacy of the legal system more by the fairness of its procedures and how they were treated than by the outcomes they received.[257] Third, *Miranda* serves the symbolic function of communicating that there are moral and constitutional limits on the methods we will permit police to engage in during official questioning. As Schulhofer argues:

> For those concerned only with the "bottom line," *Miranda* may seem a mere symbol. But the symbolic effects of criminal procedure guarantees are important; they underscore our societal commitment to restraint in an area in which emotions easily run uncontrolled.[258]

Fourth, *Miranda* has increased popular awareness of our Fifth and Sixth Amendment rights. If we value the ideals embodied in our constitutional rights, then educating Americans about their applicability in the criminal process must, necessarily, be a good thing.

Both the costs and the benefits of *Miranda* must be evaluated in any serious policy analysis of its viability. Do the benefits of *Miranda* outweigh the costs or vice versa? Should *Miranda* be overruled? Strengthened? Weakened? There can be no conclusive answers to such questions because the costs and benefits of *Miranda* are not, strictly speaking, commensurate: we cannot literally weigh them against one another on a common scale. The utilitarian approach can only weigh subjective preferences against one another in a metaphorical sense. And whether we agree that the benefits outweigh the costs or vice versa is likely to depend more on our political views than on the seeming persuasiveness of one set of arguments as against another. Liberals are more likely to support *Miranda*; conservatives are more likely to oppose it. Regardless of our biases, however, the underlying questions that concern us here are: how should we structure the balance of advantage between the state and the accused in the criminal process? And what policy options are viable? I will address the former question in the remainder of this section, and the latter question in the next section.

Even if the practical costs of *Miranda* seem to outweigh the mostly symbolic benefits it confers on a society so racked by violent crimes, it would be neither viable nor desirable to overrule *Miranda* at this time in our history. For *Miranda* has become an institution in American society, thoroughly established within our culture and our conscious-

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257 *See* ALLAN LIND & TOM TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); Tom Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 LAW & SOC'Y REV. 51 (1984).

258 *See* Schulhofer, *supra* note 70, at 460.

ness. Since most individuals already know of their rights to silence and counsel, the effect of overruling *Miranda* would be largely symbolic. Many suspects, especially ex-felons, would no doubt continue to invoke their rights, rights that would remain available to all citizens even if pre-interrogation warnings were no longer required. And surely the symbolic message that such a decision would seem to send—that police can disregard constitutional rights when interrogating criminal suspects—would cause a backlash of resentment against, and more distrust of, American police. Such a message would represent a regression at a time when the institutions of law enforcement have not only successfully adapted to the legal requirements of *Miranda*, but have publicly embraced *Miranda* as a legitimating symbol of their professionalism and commitment to fairness in the criminal process. Thus, even though *Miranda* may impede the efficiency of some criminal investigations, there would be little point in overruling *Miranda* this late in its history. Almost thirty years old, the jurisprudence and social institution of *Miranda* has passed a point of no return.[259]

If *Miranda* should not be overruled, neither should it be strengthened. For if *Miranda*'s value lies mostly in its powerful symbolism of restraint on official authority, as Schulhofer persuasively reminds us,[260] then there would appear to be little reason to give *Miranda* more practical bite. Although we feel it desirable to provide custodial suspects with the option of invoking their constitutional rights to silence and/or counsel prior to custodial questioning as well as informing them of the potential legal consequences of speaking to police, surely we are all better off when guilty offenders choose not to invoke these rights but instead confess to their wrongdoings. To "Mirandize" *Miranda* as Charles Ogletree has proposed—that is, to extend *Miranda* to include "a *per se* rule prohibiting law enforcement authorities from interrogating a suspect in custody who has not consulted with an attorney"[261]—would not merely affirmatively discourage admissions and confessions to police, but would altogether eliminate them as a source of evidence in the criminal process. That is simply too high a price to pay in as violent and crime-ridden a society as America: neither the Constitution nor common sense would warrant such a legal requirement. The Fifth Amendment prohibits only compelled testimony; it

259 I agree with former Chief Justice Burger's statement in Rhode Island v. Innis, 446 U.S. 291, 304 (1980): "The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda*, disparage it, nor extend it at this late date." *Id.*

260 *See* Schulhofer, *supra* note 70, at 460-61.

261 *See* Charles Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1830 (1987).

should not be invoked as legal authority with which to discourage or render impossible non-compelled testimony to police.

Of course, *Miranda* is not a panacea for the policy and ethical dilemmas of police interrogation in an adversary system of criminal justice that is simultaneously committed to effective crime control and fairness in its judicial procedures. Perhaps *Miranda* remains something of a compromise as its critics have long maintained, "a salve for a collective conscience that cannot reconcile libertarian ideals with what must necessarily occur in a police interrogation room."[262] Even if it has civilized law enforcement practices and professionalized police behavior inside the interrogation room, *Miranda* has altogether failed to resolve a number of problems that continue to bedevil the constitutional law of criminal procedure: the problem of adjudicating the "swearing contest" between officer and suspect in court; the problem of false allegations of police improprieties; the problem of police perjury; the problem of false confessions; and, most notably, the problem of determining the voluntariness of a confession. In the following section, I will argue that mandatory videotaping represents the most adequate solution to all of these problems.

VI. CONCLUSION: MANDATING THE VIDEOTAPING OF CUSTODIAL INTERROGATIONS

Since the early 1980s, the use of video-technology has become increasingly common in American law enforcement. Today's police routinely employ video recording in a variety of contexts, including to document crime scenes, to record suspect behavior during sobriety tests, and to conduct surveillance and undercover operations.[263] In this section, I will evaluate the policy consequences of using videotaping during custodial questioning. Drawing on Geller's extensive, nationwide study of videotaping of police interrogations and confessions[264] and following the lead of the Alaska Supreme Court in *Stephan v. State*,[265] I will argue that substantive due process requires

262 DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 200 (1991).

263 WILLIAM A. GELLER, U.S. DEPARTMENT OF JUSTICE, VIDEOTAPING INTERROGATIONS AND CONFESSIONS 1-11 (Mar. 1993).

264 *See* GELLER, *supra* note 263. *See also* William A. Geller, Police Videotaping of Suspect Interrogations and Confessions (A Report to the National Institute of Justice, unpublished manuscript) (1992).

265 711 P.2d 1156 (Alaska 1985). In *Stephan*, the Alaska State Supreme Court held that "an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process, under the Alaska Constitution, and that any statement thus obtained is generally inadmissible." *Id.* at 1158. More recently, the Minnesota State Supreme Court has—relying on its supervisory powers rather than its interpretation of the Minnesota Constitution—held that:

that we legally mandate the electronic-recording of custodial interrogations in all felony cases.

The use of audio or videotaping inside the interrogation room creates an objective record of police questioning to which all interested and potentially interested parties may appeal—police, suspects, prosecutors, defense attorneys, and juries—in the determination of truth and in judgments of justice and fairness. The use of videotaping is thus the most viable legal intervention for resolving many of the antinomies of crime control and due process inherent in police interrogation of the accused in a democratic society.[266]

Indeed, the use of videotaping during custodial interrogation is already commonplace in many American stationhouses. Two of the three departments in which I conducted my fieldwork for this study—Southville and Northville—routinely videotaped custodial questioning in felony cases.[267] More generally, in a nationwide survey undertaken in 1990, Geller found that one-sixth of all police and sheriffs' departments—approximately 2,400 law enforcement agencies—in the United States rely on videotaping in at least some of their interrogations and confessions.[268] Geller's 1990 survey revealed that most of the departments using videotaping have been doing so for at least three years; 41% have been doing so for at least five years. Geller also found that the larger the department, the more likely they are to use videotaping: while only 12% of the departments servicing populations under 10,000 videotape interrogations, 35% of the departments servicing populations of more than 250,000 rely on videotaping.[269] Similarly, departments using videotaping are more likely to do so the more serious the case: for example, video recording was used in 83% of homicide cases, 77% of rape cases, 61% of armed robbery cases, and 44% of burglary cases.[270] Geller estimated that by 1993 more than 60% of law enforcement agencies serving populations of over 50,000 would be using videotaping during interrogation in at least some types of cases.

> [A]ll custodial interrogation including any information about rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention. If the law enforcement officers fail to comply with this recording requirement, any statements the suspect makes in response to the interrogation may be suppressed at trial . . . [S]uppression will be required of any statements obtained in violation of the recording requirement if the violation is deemed "substantial."

See State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994).

266 *See* HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

267 *See* Leo, *supra* note 22.

268 *See* Geller, *supra* notes 263-64.

269 *Id.*

270 *Id.*

It is hardly surprising that police agencies are increasingly using video-technology inside the interrogation room. By video recording interrogations, police create an objective, reviewable record of custodial questioning that protects them against false accusations—accusations such as "softening up" a suspect prior to *Miranda*, failing to correctly read the *Miranda* warnings, or eliciting a confession through improper inducements. Videotaping interrogations thus lends credibility to police work—especially in urban communities, such as Los Angeles, where police are likely to be distrusted by large segments of the population—by demonstrating to prosecutors, judges, and juries both the fairness of police methods and the legality of any statements they obtain.[271] Videotaping interrogations is also likely to improve the quality of police work and thus contribute to more professional and more effective interrogation practices. Officers and detectives who know they will be videotaped are more likely to prepare their strategies beforehand and to be more self-conscious about their conduct during questioning. Videotaped interrogations can also be used in training courses to educate police about which methods are most effective, as well as those methods which are ethically and legally impermissible.[272] And videotaping offers police management a tool with which to rein in officers and detectives who may be exercising their discretion inappropriately.

Not only does it protect police against false accusations of impropriety and improve the professionalism of their practices, videotaping interrogations also facilitates the identification, prosecution, and conviction of guilty offenders. In other words, videotaping interrogations will help police pursue their traditional function of crime control more efficiently and more effectively. By creating a record of the entire interrogation session, videotaping improves the ability of police to assess the guilt or innocence of a suspect. Videotaping, for example, allows detectives to review the entire interrogation as a case unfolds and in light of subsequent evidence; videotaping also preserves the details of a suspect's statement that may not have been initially recorded in a detective's notes but may subsequently become important; and videotaping permits other officers to evaluate the plausibility of statements made by a suspect. In addition to aiding police in their assessment of guilt and innocence, detectives may use videotaped admissions against co-conspirators more effectively than written state-

271 *See* AMNESTY INT'L, UNITED STATES OF AMERICA: TORTURE, ILL TREATMENT AND EXCESSIVE FORCE BY POLICE IN LOS ANGELES, CALIFORNIA (June 1992).

272 Although the Chicago police training firm Reid & Associates openly opposes the use of videotaping inside the interrogation room, they nevertheless use videotaping to train interrogators both in their introductory and advanced training courses.

ments, which suspects (especially ex-convicts who are likely to be well aware of deceptive physical evidence ploys) might otherwise think are fabricated. Not surprisingly, according to Geller, police departments already using videotaping reported that videotaped interrogations and confessions led to more guilty pleas by suspects. They did so not only by undermining false claims of police coercion during interrogation, but also by demonstrating the questionable moral character and demeanor of the suspect to a judge and jury, according to the officers surveyed.[273]

The salutary effects of videotaping custodial interrogation on effective crime control extend beyond the police. Prosecutors reported that by capturing details that would otherwise remain missing from written interview notes or reports, videotaped interrogations provided them with a more complete record with which to better assess the state's case against the accused, to make more informed charging decisions, and to prepare for plea bargaining and trial more effectively. Because videotaped interrogations provided them with better knowledge of the case—including the demeanor and sophistication of the suspect—prosecutors believed that videotaping assisted them in negotiating a higher percentage of guilty pleas and obtaining longer sentences. Perhaps not surprisingly, Geller's study revealed that many defense attorneys oppose videotaped interrogations precisely because they find it much easier to challenge the legitimacy of, and thus cast doubt on, the written statements that suspects would otherwise make to police. Yet defense attorneys with high caseloads, such as public defenders, favored videotaping interrogations because it facilitated the processing of a guilty offender's case. As Geller states:[274]

> [V]ideotapes help them achieve "client control" by cutting through lies clients try to tell attorneys about how they were interrogated or what incriminating remarks they made. Tapes can also help attorneys persuade clients they are better off pleading guilty to a reduced charge because a taped confession virtually assures conviction.

Geller further reports that judges and juries favor videotaping because it allows them to determine more accurately a defendant's state of mind as well as the sincerity of his remorse for any wrongdoing. In short, videotaping interrogations can only assist the cause of crime control and, not surprisingly, is widely favored by virtually all criminal justice practitioners.

Why, then, do some law enforcement agencies oppose it? Geller found that most police agencies that do not videotape interrogations believe that its expense—the cost of video equipment, remodeling in-

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273 *See* GELLER, *supra* notes 263-64.

274 GELLER, *supra* note 263, at 7.

terrogation rooms, storing tapes, maintaining equipment, transcribing the tapes, etc.—outweighs any benefits it may offer. Other departments maintained that videotaping interrogations is simply unnecessary. Some feared that suspects may be reluctant to speak forthrightly in front of a camera that memorializes their statements for future review. And some police officers expressed the fear that the practice of videotaping interrogations would lead to the presumption by defense attorneys that failure to do so could only be explained by police improprieties during questioning.

None of these arguments are convincing. While the start-up and maintenance costs of video recording may appear high, they are more than repaid by the savings they offer in police officers' and the court's valuable time and resources. With the introduction of videotaping, police departments no longer need to have a second officer present during questioning for the sole purpose of taking contemporaneous notes of the suspect's statements. Instead, videotaping permits police departments to free up police personnel for other projects and investigations, a significant savings considering the length of many interrogations.[275] Videotaped interrogations also save police time and resources in court by preventing unnecessary litigation of false claims of police improprieties. As Geller notes:[276]

> The survey results, confirmed by many officers interviewed, indicated because of videotaping fewer allegations of coercion or intimidation were made by defense attorneys. On-camera administrations of the *Miranda* warning by the police are one major reason for this result. Those officers interviewed also noted they felt less pressure in the courtroom and faced fewer defense assertions that police had fabricated confessions.

Videotaping saves not only the valuable time of police officers, but also the valuable time of prosecutors, defense attorneys, and judges, all of whom are more likely to be relieved from unnecessary pretrial litigation as a result of the objective documentary record left by videotaped interrogations. In addition, as Geller notes, one of the most valuable (if least tangible) aspects of videotaping is that it may save officers from the stress and burnout associated with repeatedly having to demonstrate the voluntariness of confessions in adversarial court proceedings.

Some police officers also oppose videotaping because they believe the sight of a camera will prevent a suspect from speaking forth-

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[275] Although there were likely to be selection biases in the cases he and his colleagues encountered, Geller reports that "[a]t agencies visited, fully videotaped interviews took an estimated average of 2 to 4 hours; the longest videotaped interview was approximately 7 hours." *See id.* at 4.

[276] *Id.* at 6.

rightly to police. There is, of course, no way to definitively refute this claim in the absence of controlled experiments. However, Geller's survey found that most of the departments studied reported receiving more incriminating information from suspects after they began to videotape interrogations. Moreover, as Geller notes and as my own interviews and informal conversations with detectives confirmed, officers whose departments do not videotape interrogations are most likely to be opposed to it. Once a department begins videotaping interrogations, its detectives no longer oppose the practice. As Geller indicates, "a striking 97 percent of all departments that have ever videotaped suspects' statements continue to find such videotaping, on balance, to be useful."[277] Any effect a video camera may initially have on a suspect is likely to diminish shortly after interrogation begins. Of course, many departments that videotape interrogations do so surreptitiously by, for example, installing cameras behind one-way mirrors or in pinhole lenses and using concealed microphones. Since a suspect possesses no reasonable expectation of privacy inside a police station and has been warned that anything he says may be used to incriminate him in future legal proceedings, surreptitious video recording of custodial interrogations does not violate federal constitutional law.

Another police criticism of video recording is that it will lead to the presumption in court that any failure to videotape must have resulted from the use of legally impermissible methods during questioning. If this is true, it appears to happen in only a minority of cases. In Geller's study, 70% of the departments using videotapes reported that it had no effect on presenting untaped confessions in court, while 30% reported that they believed it made securing the admission of nonvideo confessions into evidence more difficult. Unfortunately, Geller's study does not tell us how much more difficult these officers perceived it to be. As Geller points out, however, defense attorneys' insinuations that non-video confessions were tainted rarely helped them in motions to suppress or in establishing judges' or juror's doubts about a defendant's guilt. This is hardly surprising, for, as we have seen, only very rarely will judges suppress inculpatory statements from evidence in trial proceedings against the accused. Only in the states of Alaska (where any failure to electronically record a custodial interrogation constitutes a rebuttable violation of state constitutional due process) and Minnesota will presenting non-recorded confessions in court likely lead to their suppression from evidence at trial.[278]

The real reason many police officers and detectives, such as my

277 *Id.* at 10.

278 *See* GELLER, *supra* note 263.

research subjects in Laconia, oppose video recording of confessions appears to be that the taping of custodial questioning creates an objective record of the interrogation that exposes police to potential external criticism from prosecutors, defense attorneys, and judges as well as internal criticism from police management, trainers, and coworkers. Moreover, the videotaping of custodial interrogations threatens to shift the balance of advantage between police and suspects in the "swearing contest" when their accounts of the interrogation differ in court. Since they are almost always of higher status than defendants, and since they control the social production of knowledge about the interrogation and confession, police virtually always prevail in any "swearing contest."[279] Videotaping custodial interrogations therefore threatens to undermine their superior control over the legal construction of facts about the suspect's interrogation. With videotaping, no longer can two officers "cleanse" their notes to tell similar accounts that may contradict a suspect's testimony; instead, an objective record replaces the officers' testimony as the most authoritative account of the interrogation. Videotaping custodial questioning thus represents a threat only to those officers who fear either receiving internal or external criticism about the legality of their interrogation methods or who fear losing a "swearing contest" adjudicated by an independent and objective record. In short, videotaping threatens to expose the secrecy of interrogation to the scrutiny of others.

In a democratic society committed to open and fair procedures, however, police interrogation of the accused need not be a secretive event. Police proponents such as Fred Inbau have long maintained that interrogation relies on privacy for its efficacy.[280] Yet one of the virtues of videotaping is that it removes the secrecy of interrogation that many police critics find repugnant in a democracy, without compromising the privacy that many police proponents regard as necessary to effective criminal investigation. Videotaping does not undermine the legitimate crime control functions of the police. Rather, as I have argued above, it furthers legitimate crime control efforts by protecting police against false accusations of impropriety, by lending their practices more credibility, and by providing a fuller record that assists in the identification, prosecution, and conviction of guilty offenders.

Just as videotaping will protect police against false accusations, so too will videotaping protect suspects against improper police interrogation tactics. To be sure, in the beginning some police may attempt

279 *See* NEUBAUER, *supra* note 72, at 170-73.
280 *See* INBAU ET AL., *supra* note 55, at 24-28.

to circumvent videotaping requirements by conducting more interrogations in the field.[281] And although custodial questioning has become increasingly professional in recent years, coercive practices still continue to occur in America,[282] even if with apparently declining frequency.[283] By creating an objective record of the interrogation for both internal and external review, videotaping will restrain overzealous interrogators who might otherwise resort to techniques that overstep the bounds of legality, especially in high profile cases in which little or no evidence exists against the suspect. Consequently, the videotaping of custodial interrogations will reduce police improprieties during interrogation.

The Supreme Court of the State of Alaska has persuasively argued that substantive due process requires electronic recording of the entire interrogation session in order to protect the Fifth, Sixth, and Fourteenth Amendment rights of custodial suspects.[284] The Alaska court pointed out that since police interrogation continues to take place largely incommunicado, we do not know what transpires between an officer and suspect during custodial questioning. Nevertheless, courts are called on to establish a factual record of the interrogation in light of the conflicting testimony of police officers and criminal defendants. Emphasizing the fallibility of human memory, the Alaska court argued that such testimony may inadvertently lead different individuals to forget specific facts and selectively interpret past events, thus producing an inaccurate court record. The absence of an accurate record, the Alaska court reasoned, may infringe upon the suspect's constitutional rights to silence, to an attorney, and to a fair trial. "An electronic recording, thus, protects the defendant's constitutional rights, by providing an objective means for him to corroborate his testimony concerning the circumstances of the confession."[285] Stressing that the concept of due process is dynamic and so must keep pace with changing times and new technological developments, the Alaska Supreme Court went on to hold that:

> [T]he rule that we adopt today requires that custodial interrogations in a place of detention, including the giving of the accused's *Miranda* rights, must be electronically recorded. To satisfy this due process requirement, the recording must clearly indicate that it recounts the entire interview . . . . Any time a full recording is not made, however, the state must persuade the trial court, by a preponderance of the evidence,

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281 Michael McConville & Philip Morrell, *Recording the Interrogation: Have Police Got It Taped*, CRIM. L. REV. 158, 160 (1982).

282 *See supra* note 211.

283 *See generally* Leo, *From Coercion to Deception*, *supra* note 147.

284 *See* Stephan v. State, 711 P.2d 1156 (Alaska 1985).

285 *Id.* at 1161.

that recording was not feasible under the circumstances and in such cases the failure to record should be viewed with distrust.[286]

Videotaping not only encourages fairer treatment of suspects during custodial interrogation, it also offers suspects greater protection against the possibility of a wrongful conviction based on a false confession to police.[287] By creating an objective record of the entire interrogation, videotaping permits the courts (as well psychological experts, if necessary) to independently evaluate both the voluntariness and the veracity of a confession with far greater accuracy than when the court is left merely with the conflicting testimony of a suspect and his interrogators. Psychologically-induced false confessions appear to be occurring with troubling frequency,[288] yet they are neither acknowl-

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286 *Id.* at 1162.

287 False confessions to police has been one of the leading causes of miscarriages of justice in capital cases in the twentieth century. *See* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

288 In both England and America, researchers have uncovered numerous documented cases of false confessions to police, many of which subsequently resulted in wrongful convictions and lengthy prison sentences. *See* Richard A. Leo, False Memory, False Confession; When Police Interrogations Go Wrong 1-58 (Paper presented at the Annual Meetings of the Law and Society Association, Toronto, Canada, June 1-4, 1995; on file with *The Journal of Criminal Law and Criminology*); JOAN BARTHEL, A DEATH IN CANAAN (1976); DONALD S. CONNERY, CONVICTING THE INNOCENT: THE STORY OF A MURDER, FALSE CONFESSION, AND THE STRUGGLE TO FREE A "WRONG MAN" (1996); DONALD S. CONNERY, GUILTY UNTIL PROVEN INNOCENT (1977); GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY (1992); C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 110-41 (1996); ROBERT PERSKE, UNEQUAL JUSTICE? WHAT CAN HAPPEN WHEN PERSONS WITH RETARDATION OR OTHER DEVELOPMENTAL DISABILITIES ENCOUNTER THE CRIMINAL JUSTICE SYSTEM (1991); SELWYN RAAB, JUSTICE IN THE BACKROOM (1967); LAWRENCE WRIGHT, REMEMBERING SATAN: A CASE OF RECOVERED MEMORY AND THE SHATTERING OF AN AMERICAN FAMILY (1994); LAWRENCE WRIGHTSMAN & SAUL KASSIN, CONFESSIONS IN THE COURTROOM (1993); MARTIN YANT, PRESUMED GUILTY: WHEN INNOCENT PEOPLE ARE WRONGLY CONVICTED (1991); Edwin Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968); Gisli H. Gudjonsson & James MacKeith, *Learning Disability and the Police and Criminal Evidence Act 1984. Protection During Investigative Interviewing: A Video-Recorded False Confession to Double Murder*, 5 J. FORENSIC PSYCHIATRY 35 (1994); Gisli H. Gudjonsson & James MacKeith, *A Proven Case of False Confession: Psychological Aspects of the Coerced-Compliant Type*, 32 MED., SCI., AND THE LAW 187 (1990); Gisli H. Gudjonsson, *One-Hundred Alleged False Confession Cases: Some Normative Data*, 29 BRIT. J. CLINICAL PSYCHOL. 249 (1990); Gisli H. Gudjonsson, *The Psychology of False Confessions*, 57 MEDICO-LEGAL J. 93 (1989); Gisli H. Gudjonsson & James MacKeith, *False Confessions, Psychological Effects of Interrogation, in* RECONSTRUCTING THE PAST: THE ROLE OF PSYCHOLOGISTS IN CRIMINAL TRIALS 253-69 (A. Trankel ed., 1982); Richard Ofshe, *Inadvertent Hypnosis During Interrogation: False Confession Due to Dissociative State; Mis-Identified Multiple Personality and the Satanic Cult Hypothesis*, 40 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 125 (1992); Richard Ofshe, *Coerced Confessions: The Logic of Seemingly Irrational Action*, 6 CULTIC STUD. J., 6 (1989); Phillip Zimbardo, *Coercion and Compliance: The Psychology of Police Confessions, in* THE TRIPLE REVOLUTION 492-508 (C. Perruci & M. Piluski, eds., 1971); Roger Parloff, *False Confessions* 1993 AM. LAW. 58-62; Philip Weiss, *Untrue Confessions*, MOTHER JONES, Sept. 1989, at 20-24, 55-57; ABC television broadcast, *Nightline: The Railroading of the Tucson Four*, Sep. 2, 1993.

edged nor well-understood by police or other criminal justice professionals.[289] In recent years, psychologists and sociologists have

[289] Psychologically manipulative and deceptive interrogation techniques have the potential of inducing false confessions from innocent suspects. *See supra* note 289. Yet one of the most troubling aspects of psychologically-induced false confessions is that police leaders and trainers such as Inbau et al. steadfastly deny that highly manipulative and deceptive interrogation tactics may produce confessions of guilt from entirely innocent suspects. INBAU ET AL., *supra* note 55 at 147-53, 319-23. As Gudjonsson has pointed out, however: "Inbau, Reid and Buckley do not consider the possibility that anybody who retracts a previously made confession could possibly be innocent. They work on the misguided assumption that their recommended tactics and techniques *never* induce an innocent person to falsely confess. There are sufficient numbers of proven cases of innocent persons retracting false confessions to demonstrate that this belief of Inbau, Reid and Buckley is unfounded." *See* GUDJONSSON, *supra* note 288, at 222. Due to the deeply held belief in police culture that virtually all suspects are guilty, and will confess to police only if they are guilty, police interrogators may elicit false confessions without realizing it. This occurred in the well-known cases of George Whitmore in the mid-1960s and Peter Reilly in the early 1970s. *See* BARTHEL, *supra* note 288; CONNERY, *supra* note 288; Zimbardo, *supra* note 288; BERNARD LEFKOWITZ & KENNETH G. GROSS, THE VICTIMS; THE WYLIE-HOFFERT MURDER CASE AND IT'S STRANGE AFTERMATH (1969); RAAB, *supra* note 288; FRED SHAPIRO, WHITMORE (1969); Joseph O'Brien, *Mother's Killing Still Unresolved, but Peter Reilly Puts Past Behind*, THE HARTFORD COURANT, Sept. 23, 1993, at A1. More recently, American police unknowingly elicited multiple false confessions in the case of "the Tucson Four," as well as a false confession in the case of Tom Sawyer, and the case of George Abney. *See* Leo, *supra* note 288; YANT, *supra* note 288; Ofshe, *Coerced Confessions, supra* note 288; Russ Kimball & Laura Greenberg, *Trials and Tribulations*, PHOENIX MAG., Dec. 1993, at 101-11; Russ Kimball & Laura Greenberg, *False Confessions*, PHOENIX MAG., Nov. 1993, at 85-95; Russ Kimball & Laura Greenberg, *Revelations*, PHOENIX MAG., Oct. 1993, at 82-93; Parloff, *supra* note 288; Louis Sahagun, *Arizona Murder Probes Put the Wrong Men Behind Bars: Experts Say the Interrogation Techniques Used Show How the Innocent Can be Pushed into Confessions*, L.A. TIMES, Feb. 13, 1993, at A1; Weiss, *supra* note 288; State v. Sawyer, 561 So. 2d 278 (Fla. Dist. Ct. App. 1990); *Nightline, supra* note 288. In all of these high-profile cases, the innocent suspect provided a vague and speculative confession statement to police after lengthy, and sometimes intense, interrogation sessions. Despite the police detectives' (and prosecutors') steadfast belief in the suspect's apparent guilt, the suspect's confession was contradicted by all existing physical evidence. Fortunately, in each of these cases the innocent suspect who falsely confessed was eventually cleared or acquitted of all charges brought against him. There is good reason to believe, however, that many other innocent suspects have not been so fortunate, but instead have been wrongfully convicted and incarcerated because of their highly questionable confessions to police. For example, the recent cases of Paul Ingram, Bradley Page, and Vivian King all appear to be miscarriages of justice arising out of false confessions. *See* Leo, *supra* note 288; WRIGHT, *supra* note 288; WRIGHTSMAN & KASSIN, *supra* note 288; Ofshe, *Inadvertent Hypnosis, supra* note 288; Glenn Chapman, *Inmate Linked to Murders: Convicted Murderer May Have Killed Five East Bay Girls*, OAKLAND TRIB., Jan. 14, 1994. Glenn Chapman, *Friends Ask Who Killed Bibi Lee*, OAKLAND TRIB., Jan. 14, 1994; Frank Lawlor, *Not Guilty, King Pleads to Charge of Killing Girl*, PHILADELPHIA INQUIRER, Apr. 8, 1993, at B1; Linda Loyd, *Vivian King Gets 10 Years in Prison*, PHILADELPHIA INQUIRER, June 3, 1994, at B1; Linda Loyd, *Cursing and Crying, Vivian King Tells Murder Jury She Was Forced to Confess*, PHILADELPHIA INQUIRER, Nov. 2, 1993, at A1; Jack Page, *A Question of Justice: A Father's Plea for Bradley Page*, EAST BAY EXPRESS, Oct. 12, 1990, at 1; Ethan Watters, *The Devil in Mr. Ingram*, MOTHER JONES, July/Aug. 1991, at 30. As with known cases of false confessions, in all three of these high-profile cases the suspects were interrogated for lengthy periods of time and ultimately provided police with vague and speculative confessions that were contradicted by all existing physical evidence. Nevertheless, all three suspects—and presumably many

identified three types of false confessions to police: "voluntary"[290] false confessions, "coerced-compliant"[291] false confessions, and "coerced-internalized"[292] false confessions.[293] Electronic recording of interro-

criminal suspects whose cases did not receive as much, if any, publicity—remain incarcerated for crimes they do not appear to have committed. Because confession statements are generally regarded by everyone—from police and prosecutors to judges and juries—as the most probative and damning evidence of guilt, a false confession to police is extremely likely to result in a wrongful conviction. *See* Richard A. Leo, *supra* note 22.

290 Voluntary false confessions are spontaneous and thus do not involve any police questioning methods. They typically arise when individuals go into a police station to provide a false statement of guilt. The more well-known the offense, the more likely false confessors will emerge to proclaim their guilt. More than two hundred individuals confessed to the famous Lindberg kidnapping in the 1930s, for example. Miles Corwin, *False Confessions Not Good for Investigator's Souls*, DENVER POST, May 4, 1996, at 22A. Kassin and Wrightsman argue that voluntary false confessions arise for three reasons: a desire for notoriety, the need to expiate guilt for a prior wrongdoing, and an inability to distinguish between fact and fantasy. WRIGHTSMAN & KASSIN, *supra* note 288. Gudjonsson adds that voluntary false confessions may also arise if the confessor wishes to protect or assist the real offender. GUDJONSSON, *supra* note 288. The distinguishing feature of voluntary false confessions is that they do not arise in response to any police pressure.

291 "Coerced-compliant" false confessions arise when the suspect knowingly provides his interrogators with false information in order to put an end to the psychological pressures of the interrogation session. In other words, the suspect evaluates the instrumental gains of escaping the interrogation situation as well as the costs of providing police with the information they wish to hear. As Gudjonsson points out, "The perceived instrumental gain may include the following: 1) being allowed to go home after confessing; 2) bringing the interview to an end; 3) a means of coping with the demand characteristics, including perceived pressure of the situation; 4) avoidance of being locked up in police custody." *See* GUDJONSSON, *supra* note 288, at 227-28. The suspect falsely confesses to police to escape from an interrogation situation that he perceives as intolerably stressful. We intuitively understand the logic of coerced-compliant false confessions when they occur in response to physical abuse or extreme fatigue. Coerced-compliant false confessions may also occur, if less commonly, in response to interrogation techniques relying on sustained psychological pressures to confess. It is not surprising, as Gudjonsson points out, that coerced-compliant false confessors are likely to retract or withdraw their false confession as soon as they escape the immediate pressures of the interrogation environment.

292 The "coerced-internalized" false confession is the least understood yet most troubling type of false confession. It occurs when the psychological pressures of interrogation cause an innocent person to temporarily internalize the message(s) of his interrogators and falsely believe himself to be guilty. The typical sequence of a coerced-internalized false confession is as follows: First, the innocent suspect becomes confused by the interrogators' repeated assertions of his guilt; second, the innocent suspect begins to experience self-doubt and lose confidence in his own recollections (or lack of recollection); third, the suspect responds to the pressures of the interrogation and the apparent evidence of his guilt by coming to believe that he must have committed the crime of which he is being accused, despite no memory of having done so; and, finally, the suspect struggles to create a story that fits the details of that offense. Coerced-internalized false confessions contain an identifiable logic: they arise when interrogators destabilize the self-confidence of suggestible suspects who then struggle to make their story fit the details of an offense of which they have no recollection; the confession is therefore couched entirely in speculative or tentative language such as "I must have" or "I could have" or "I don't know, but I think I did"; and the suspect's false confession inevitably contradicts the known facts of the case. *See* Richard A. Leo, *supra* note 288. For this reason, I believe that although it is the most important safeguard against false confessions, by itself videorecording is not sufficient;

gations would permit us to identify the custodial pressures and interrogation techniques that give rise to both types of coerced false confession. By facilitating the difficult task of uncovering and demonstrating the reality of psychologically-induced false confessions to police, videotaping would provide an important safeguard against wrongful convictions. Not surprisingly, the existence of a recorded transcript of the full interrogation may make the difference between acquittal and conviction in coerced-internalized false confession cases.[294]

In sum, electronically recording custodial interrogations promotes the goals of truth-finding, fair treatment, and accountability in the legal process. By creating an objective and reviewable record of police questioning, we further the policy objectives that underlie our dual concerns for crime control and due process. Videotaping protects police from false accusations of impropriety at the same that it protects suspects against legally impermissible police practices. Videotaping improves the quality of interrogation practices and lends greater credibility and legitimacy to police work. And videotaping memorializes the details of the interrogation and confession for future review, details that may become indispensable in the process of convicting guilty defendants and acquitting innocent ones. These are all unqualified social goods. It is therefore not surprising that both liberal *and* conservative legal scholars have recommended the use of videotaping inside the interrogation room.[295] Our ideals of truth, fairness, and justice in a democratic society demand no less.

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strict evidentiary corroboration requirements must also be maintained. *See* Corey Ayling, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 WIS. L. REV. 1121.

293 Saul M. Kassin & Lawrence S. Wrightsman, *Confession Evidence*, *in* THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 67 (Saul M. Kassin & Lawrence S. Wrightsman eds. 1985).

294 *See* Richard A. Leo, *supra* note 288; *Crime, Lies, Videotape: Disputes Over Confessions Can be Resolved*, PHILADELPHIA INQUIRER, Nov. 8, 1993, at A10; Laura Griffin, *Getting it Down on Tape; Attorneys for Freed Man Want All Interrogations Recorded*, ST. PETERSBURG TIMES, Mar. 25, 1990, at 3B.

295 *See, e.g.*, GRANO, *supra* note 19, at 116, 221; YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY at 113-137 (1980); Caplan, *supra* note 11, at 1474-75; Cassell, *supra* note 19, at 486-92; Schulhofer, *supra* note 164, at 556-60.